No. 33
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VOLUME IV

Supreme Court, U. S.
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MAR 21 1953
HAROLD B. WILLEY, Clerk

TRANSCRIPT OF RECORD

SUPREME COURT
OF THE
UNITED STATES

OCTOBER TERM, 1952

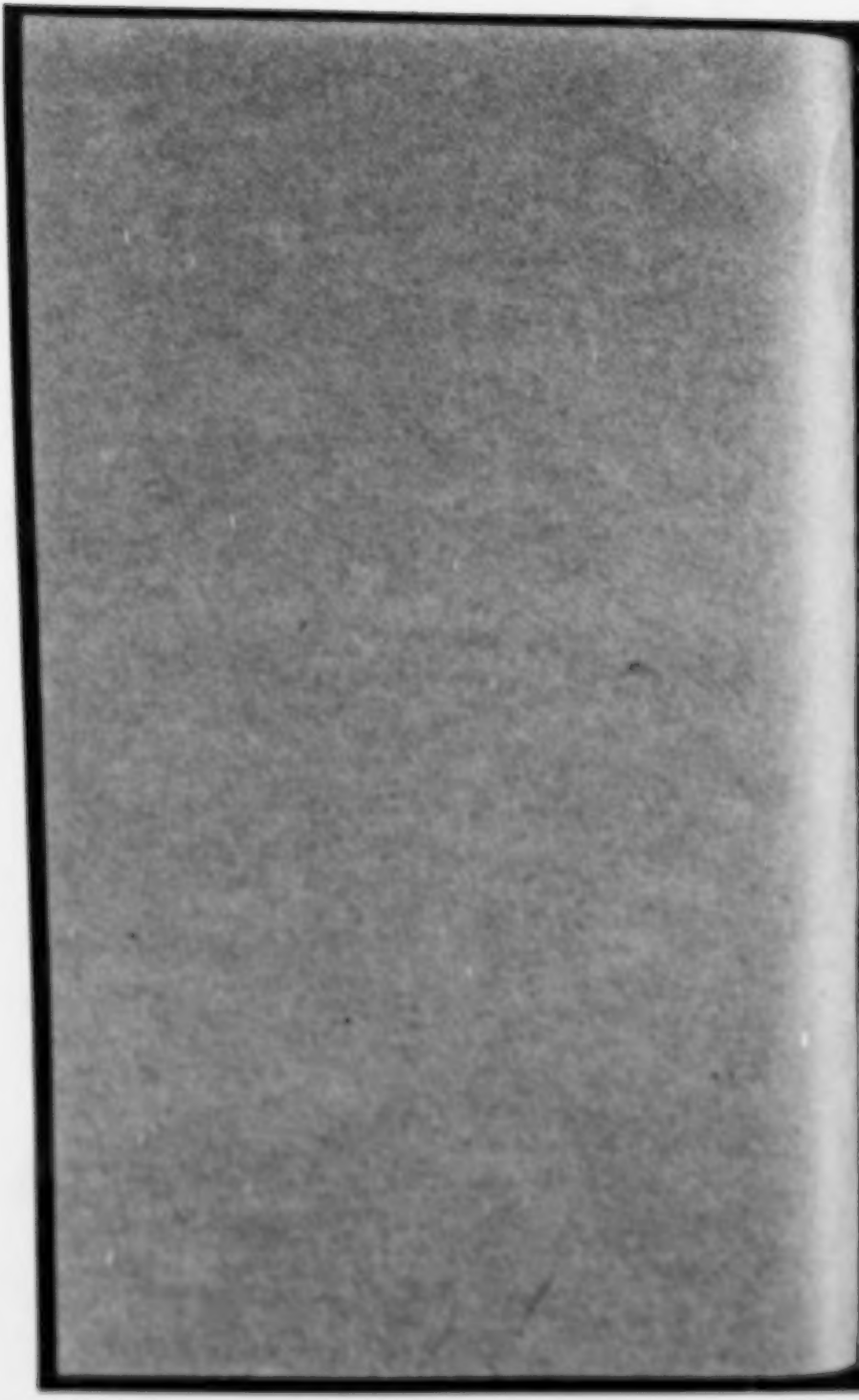
No.

ST. JOE PAPER COMPANY, ET AL.,
Petitioners,

versus

ATLANTIC COAST LINE RAILROAD COMPANY
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.



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INTERSTATE COMMERCE COMMISSION

FINANCE DOCKET NO. 13170

FLORIDA EAST COAST RAILWAY COMPANY REORGANIZATION

Submitted December 8, 1944. Decided January 8, 1945

Upon further hearing, the plan of reorganization for the Florida East Coast Railway Company, pursuant to section 77 of the Bankruptcy Act, as amended, further modified and approved.[1]

Appearances as in prior reports and also *Shelton Pitney, J. Henry Blount, Charles Cook Howell, F. K. Conn, E. N. Claughton, Thomas H. Anderson, Edward J. Kenn, Louis Kurz, William A. W. Stewart, W. E. Brownback, Alfred F. Tokar, Thomas O'G. FitzGibbon, H. Plant Osborne, Richard B. Gwathmey,* and *John C. Donnally.*

SECOND SUPPLEMENTAL REPORT OF THE COMMISSION

BY THE COMMISSION:

By report and order of April 6, 1942, 252 I. C. C. 423, this Commission, division 4, approved pursuant to the provisions of section 77 of the Bankruptcy Act, 11 U. S. C. 205, a plan of reorganization for the Florida East Coast Railway Company. A certified copy of the report and order was filed in the District Court of the United States, Southern District of Florida, in which court proceedings for the reorganization of the debtor herein are pending. This court hereinafter will be referred to as the court. By our supplemental report and order of August 10, 1942, 252 I. C. C. 731, upon petitions filed by various parties in interest, we modified the order of April 6, 1942, *supra*, in certain particulars and filed in the court a certified copy of the supplemental report and order. Thereafter, a hearing was held before the court on objections to the plan. By order entered October 19, 1943, the judge (*a*) sustained an objection to the plan that the existence of unallocated cash on hand at the time of his order renders the plan inequitable, (*b*) sustained an objection of Florida National Building Corporation, an intervener in the proceeding, that its present security holdings entitle it to designate a reorganization manager and (*c*) decreed that a new effective date should be designated. The court

[1] Previous reports, 252 I. C. C. 423 and 731, and 254 I. C. C. 555.

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reserved its decision on all other questions, disapproved the plan as inequitable, and held that, because of the accumulations of cash on hand, the plan does not afford due recognition to the rights of security holders, especially minority holders. The court referred the proceeding back to us for further consideration to afford us an opportunity to reexamine the entire situation in the light of the facts which have developed since our former hearing.[2]

We assigned the proceeding for further hearing before us on May 3, 1944. Subsequent to the hearing briefs were submitted.

POSITIONS OF THE PARTIES

At the further hearing or prior thereto and by briefs filed after the close of the hearing, oral and written statements were made or filed setting forth the opinions of several of the parties as to a proper and equitable plan of reorganization for the debtor. The principal features of these proposed modifications are as follows:

The St. Joe Paper Company, (successor to the Florida National Building Corporation), is controlled by the Alfred I. duPont estate and, as of May 3, 1944, owned $23,259,000, principal amount, of the debtor's first and refunding mortgage 5-percent bonds, series A, due September 1, 1974, (hereinafter called first and refunding bonds) out of a total outstanding of $45,000,000. The duPont estate additionally owned on the same date $100,000 principal amount of these bonds and the president of the St. Joe Paper Company, Edward Ball, owned $34,000. About $8,000,000 of the bonds owned by the St. Joe Paper

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[2] In his opinion accompanying his order, the judge found that the trustees of the debtor had cash on hand as of October 1, 1943, of $17,795,365 as compared with $1,301,857 as of December 31, 1940. The judge estimated that, as of December 31, 1943, the trustees would have a net cash balance of $14,580,205 after payment of all taxes for 1943, both State and Federal. The judge states that this is cash on which the bondholders have a lien and, "to the extent that it is prudently available, the bondholders are entitled to the benefit of this surplus cash, either by having it applied in an equitable manner in satisfaction of their claims, or by having it otherwise definitely allocated by the Commission as a component part of the reorganization plan, so that it may be equitably applied to the best advantage of all concerned." The judge stated further: "If the post-reorganization corporate directors were disposed to use this fund to pay off $12,000,000 of the proposed new First Mortgage bonds, it would be necessary to pay at 5% 'call' premium, aggregating $600,000. The existing $12,000,000 First Mortgage bonds could be retired as a part of this section 77 reorganization without penalty. If it is feasible to apply $12,000,000 of this cash surplus in discharge of the existing First Mortgage bonds, the capital structure of the new company could be desirably simplified and its annual cash requirements substantially reduced. Payment of the existing First Mortgage bonds would render unnecessary a judicial determination of existing lien priorities, now in dispute, thus avoiding extended and costly litigation, which would further delay this reorganization. If the use of $12,000,000 to discharge the present First Mortgage bonds would leave insufficient funds available, for working capital and for future capital expenditures after reorganization, a new first mortgage could be devised, in lieu of existing mortgages, under which the two series of bonds could be issued, each sharing pari passu in the security of the mortgage, one series a fixed interest bond of not exceeding $6,000,000 aggregate principal to be used for capital expenditures, the other series an income bond, in an appropriate aggregate principal sum, for distribution amongst First Refunding bondholders."

Company were acquired from the owners of bonds represented by the 5-percent committee [3] subsequent to the former hearing held by us in 1942 in this proceeding. The St. Joe Paper Company offered evidence and filed a brief in support of its request for the following modifications of the plan:

(1) To include, as a component part of the plan, provision for the payment of first-mortgage bonds at par plus accrued interest out of the funds of the trustee; (2) to retain the provision authorizing new first-mortgage bonds for the purpose of constructing extensions contained in the plan but provide that they shall be redeemable at par with accrued interest on reasonable notice; (3) to provide that the $4,500,000 general-mortgage income bonds issuable under the plan, shall, if the first mortgage is paid off, be issued as first-mortgage bonds and be distributed pro rata to the holders of the first and refunding bonds, as provided in the plan, ranking *pari passu* with any new first-mortgage bonds which may be issued for future betterments under the conditions now contained in the plan; (4) to eliminate the provision for the appointment of a reorganization manager by the institutional group of first mortgage bondholders and provide for the appointment of only two managers, one to be appointed by the St. Joe Paper Company and the other by the court; (5) to amend the provision which limits the maximum number of directors of the new company to 11 by permitting a maximum of 27; (6) to amend the provisions so as to provide that the term of office of directors shall be 1 instead of 3 years; and (7) to extend to January 6, 1945, the time within which reorganization shall be completed.

Other intervening owners of first and refunding bonds appearing at the hearing on May 3, 1944, in support of these proposals of the St. Joe Paper Company were Edward Ball, president of the company and owner of $34,000 principal amount of the bonds, E. N. Claughton, owner of $2,141,000, Fred K. Conn and associates, owners of $1,030,000, Safe Deposit & Trust Company, owner of $1,900,000, Bancroft T. Foley, owner of $115,000, Ogden T. Davis, owner of $60,000, and Royal Palm Investment Company, owner of $88,000. These bondholders are included in a list of 76 parties holding a total principal amount of $7,738,800 of first and refunding bonds, which are additional to those owned by the St. Joe Paper Company, all of whom filed identical petitions for leave to intervene and identical petitions in support of the above proposals for modification of the plan. Since only the above parties appeared at the hearing in support of their petitions and as none of the others indicated any desire to participate in the proceeding by offering evidence or filing briefs or otherwise, the in-

[3] Reference is to the deposit committee for the debtor's first and refunding mortgage bonds.

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tervention petitions, all of which were filed at the hearing, were granted by the presiding officer in respect of the above-named parties only.

The deposit committee for first and refunding mortgage bonds, hereinafter referred to as the 5-percent committee, also urges that the first mortgage be paid in full and additionally proposes:

(1) That the permissible capitalization of the new company be increased from $37,000,000 to approximately $57,000,000; (2) that the $12,000,000 of first-mortgage fixed-interest bonds issuable under the plan for distribution to the outstanding first-mortgage bondholders be issued and distributed instead to the first and refunding bondholders; (3) that the principal amount of general-mortgage bonds issuable in the reorganization be increased from $4,500,000 to $9,000,000 and that common stock be issued for the remainder of a total capitalization of $57,000,000, after assumption by the new company of the debtor's equipment obligations (amounting to $1,114,000 as of February 29, 1944) and the issuance of $12,000,000 of first-mortgage fixed-interest bonds and $9,000,000 general-mortgage income bonds; (4) that the reorganization managers be authorized to fix the date as of which claims shall be capitalized in new securities, such date to be not earlier than July 1, 1944, all of the new securities to be dated as of, and to bear interest from, the first day of the month in which the plan shall be consummated, but that the plan should not affect creditors' claims until the new securities are actually issued by the reorganized company and the carrying out of the plan should not require any retroactive change in the operation of the debtor's trustees, or in their accounts, or in the reports made to us, or in any reports or returns for the period prior to the date when such new securities are issued; (5) that the plan contain a so-called "escape" clause in the new first mortgage in form as follows:

Notwithstanding the limitation in clause (a) of the provision permitting modification of the new first mortgage, such first mortgage shall provide that the obligation of the reorganized company to pay the principal of and interest on first-mortgage bonds issued in the reorganization (and any other first-mortgage bonds as to which it may be so provided in the first mortgage or in any supplemental indenture (may be modified by the concurrent action of the new company and of the holders of not less than three-fourths in aggregate principal amount of the bonds affected by such modification then outstanding, so as to postpone the time of payment of any particular installments of interest, or any described number of installments of interest, until any fixed or determinable date or until the happening of any specified contingency, not in any case later than the date when the principal of such bonds shall be or become payable; but no postponement shall be made of any installment of interest in excess of a cumulative total of 10 semiannual installments excluding installments paid or as to which due provision for payment has been made, and before any such postponement becomes effective the holders of such bonds shall become, and until all postponed install-

ments of interest be paid or due provision for payment thereof be made shall remain, entitled to elect the smallest number of directors necessary to constitute a majority of the full board.

(6) That, in addition to receiving all of the new securities to be issued in the reorganization as above set forth, the present first and refunding mortgage bondholders, should receive a pro rata cash distribution which should aggregate the lesser of $6,000,000 or the amount in excess of $4,000,000 by which the current assets of the debtor's trustees shall exceed their current liabilities, exclusive of accrued interest on first and refunding bonds, plus a reasonable reserve for reorganization expenses, on the first day of the month in which the reorganization is actually consummated; provided, that the provision for such cash distribution should not prejudice the right of the first and refunding bondholders to receive distributions on account of interest accrued and unpaid, from time to time prior to the consummation of the plan when, and as, the cash position of the debtor is sufficient to justify the making of such distributions; (7) that provision be made for the election of the entire board of directors of the reorganized company annually and for the creation of a voting trust for all of the new common stock for a period of 10 years. The proposal is for three voting trustees, two to be designated by the trustees of the Alfred I. duPont estate and one by the court to represent the minority interests, the trustee to be designated by the court to have the power to elect at least three directors and the trustees designated by the trustees of the duPont estate to have the power to elect the remainder. Any successor to the voting trustee designated by the court would be designated by a judge of the United States District Court for the Southern District of Florida, and any successor to the voting trustees designated by the trustees of the duPont estate by the trustees of that estate. The provision for cumulative voting should be effective upon termination of the voting trust; and (8) that there be three reorganization managers, one to be designated by the trustees of the Alfred I. duPont estate; one by the court, and one in such manner as the court may determine, to represent the minority holders of the debtor's first and refunding bonds.

The 5-percent committee initiated this reorganization proceeding by filing a plan of reorganization with us on January 25, 1941. At that time the committee represented owners of first and refunding bonds totaling not less than 5 percent of all of the debtor's indebtedness and not less than 10 percent in amount of the total outstanding issue of the first and refunding bonds. As of May 5, 1944, however, the committee represented the owners of only $1,329,000 of the bonds, the St. Joe Paper Company having since the date of our former hearing in 1941 acquired a majority in amount of the total issue, largely

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by purchase of bonds formerly deposited with the 5-percent committee.

Fred G. Hamilton, owner and representative of first and refunding bonds, requests that the approved plan be modified as follows:

(1) That the effective date be changed to July 1, 1944; (2) that the present first-mortgage 4½-percent bonds of the debtor be left undisturbed; (3) that all surplus cash in the hands of the trustees of the debtor at the effective date of the plan or earlier, over and above reasonable and necessary working capital, maintenance charges, reserve for taxes, and other contingencies be paid to the holders of first and refunding bonds in payment on account of defaulted interest on the bonds; (4) that if such cash is not required to be so paid to holders of first and refunding bonds, then, before modifying the plan, we determine, or request the court to determine, the relative rights and priorities of the first mortgage and first and refunding mortgage after which, as part of a plan of reorganization, we allot the cash on hand as between holders of bonds issued under the two mortgages on the basis of the relative earning powers of the two properties since the inception of the debtor's receivership proceeding on May 12, 1932, and determine fair compensation to these bondholders for surrender of senior rights; (5) that the plan provide that all shares of stock to be issued under the plan be placed in a voting trust for a term of at least 5 years, under the provisions of a trust agreement to be approved by us.

Joseph van B. Wittmann and others, interveners, and S. A. Lynch, intervening separately, all of whom are holders of first and refunding bonds, jointly request the following modifications of the plan:

(1) That the present first mortgage be paid in cash; (2) that the capitalization be increased to $54,000,000 (exclusive of equipment obligations which are to be assumed by the reorganized company) to consist of $27,000,000, principal amount, of first-mortgage 4½-percent 75-year income bonds, and 450,000 shares of no-par-value common stock representing an equity value of $27,000,000; (3) that interest on the new income bonds accumulate up to a maximum of 3 percent in any 1 year and up to a total maximum of 9 percent and that the mortgage securing them provide for a contingent one-half of 1 percent sinking fund; (4) that holders of the new common stock have no preemptive right to subscribe to any additional issues of stock of any class or of securities convertible into stock of any class or to warrants or options for the purchase of securities or stock of any class, and that there be established a 10-year voting trust administered by 3 voting trustees, one to be designated by the court to represent minority interests and to have the power annually to elect one-third of the directors of the reorganized company, his successor to be designated by a judge of the District Court of the United States for the Southern

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District of Florida; (5) that all of the new bonds and stock issuable in the reorganization be distributed ratably to present holders of the debtor's first and refunding bonds; (6) that there be created an executive or finance committee of the reorganized company consisting of 5 members of the board of directors, at least 1 of whom would be one of the minority directors elected by the voting trustee, designated by the court; (7) that the board of directors of the reorganized company consist of either 12, 15, or 18 members who, during the life of the voting trust, would be elected annually by the voting trustees and thereafter annually by the stockholders by cumulative voting; (8) that there be 3 reorganization managers, who should carry out the plan under the supervision and direction of the court, 1 to be designated by the trustees of the Alfred I. duPont estate and 2 by the court, 1 of the latter to be so designated by the court in such manner as the court may determine, to represent the interests of the minority holders of the debtor's present first and refunding bonds; and (9) that all costs of administration of the trustees of the debtor's estate, including the amounts of all claims for compensation and expenses allowed pursuant to section 77 of the Bankruptcy Act, as amended, be paid in cash.

Guaranty Trust Company of New York and Arthur E. Burke, trustees under the debtor's first mortgage, the institutional group of first-mortgage bondholders, owning $5,102,000, principal amount, of the debtor's outstanding first-mortgage bonds or about 43 percent of the total issue, and an independent protective committee for the debtor's first-mortgage bondholders all request that the present first-mortgage bonds be paid in full in cash together with interest to the date of payment.

United States Trust Company of New York, as trustee of two issues of bonds of Jacksonville Terminal Company, whose terminal facilities at Jacksonville are used by the debtor and whose bonds are guaranteed by the debtor together with other joint owner-tenants, requests that the plan be modified so as to provide that the reorganized company shall affirm and be bound by the operating agreements between the debtor and Jacksonville Terminal Company, including particularly the guaranty of the latter's bonds.

Frank D. Newman, an unsecured creditor holding by assignment a judgment against the debtor in the sum of $1,018 entered in the Circuit Court of the Eleventh Judicial Circuit of Florida (prior to the institution of the debtor's insolvency proceedings) in a suit by Rae Lawrence, widow, against the debtor, submits three plans of reorganization for our consideration. The plans are as follows:

First plan.—That the plan be modified by provision for payment in

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full in cash of the present first mortgage, and for the issue of (1) $20,000,000 of new fixed-interest 4½-percent first-mortgage bonds to be payable at the rate of $500,000 per annum beginning on the tenth year after the date of issue, such bonds to be delivered to present first and refunding bondholders in principal amounts equal to the prices such holders paid for their bonds plus interest at 3 percent, (2) second-mortgage 4-percent 10-year bonds to be distributed to unsecured creditors in the amounts of their claims plus 3 percent interest if earned, unless such creditors shall have paid less than the face amounts for their claims in which case only second-mortgage bonds shall be distributed to them in amounts equal to the amounts paid for the claims plus interest, and (3) new no-par stock to be issued proportionally to the old stockholders.

First alternative plan.—(1) That the first mortgage be paid in full without interest from the last interest-payment date to the date of payment, (2) that not exceeding $5,000,000 of 4½-percent new first-mortgage emergency bonds be issued repayable at the rate of $100,000 per annum beginning on the tenth year after date of issue, (3) that new non-interest-bearing second-mortgage bonds be issued in a principal amount equal to the principal amount of the existing first and refunding bonds, such bonds to be repayable at the rate of $400,000 per annum beginning on the tenth year after the date of issue, (4) that third-mortgage non-interest-bearing bonds be issued to unsecured claimants in the amounts of their claims, such bonds to be payable at the rate of $100,000 per annum beginning on the tenth year after the date of issue and (5) new stock be issued proportionally to old stockholders.

Second alternative plan.—That this reorganization proceeding be stayed until, after adequate investigation, it shall be ascertained whether the earnings of the debtor are now and will be for the reasonably near future, sufficient to pay off the first mortgage, the interest on the first and refunding mortgage, all operating expenses, and the principal amounts due unsecured creditors, in which case we should approve a plan providing for payment of unsecured claims and which would secure some benefit to present stockholders.

From the foregoing summary of the various proposals made by parties to this proceeding, it will be observed that all parties with the exception of Fred G. Hamilton urge that we modify the plan so as to provide for the payment and discharge of the existing first mortgage, a modification also suggested by the court.

AMOUNT OF CAPITALIZATION

Earnings.—In our report of April 6, 1942, *supra*, we referred to the immediately favorable effect upon the debtor's net railway operating

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income of the abandonment by the debtor in 1935 of its Key West extension. It is stated in the report:

> It is, therefore, apparent that the earnings record for the years immediately prior to 1936 affords little, if any, basis for a determination of probable earnings in the future.

The record of this proceeding has now been supplemented to show the debtor's railway operating revenues and income available for fixed charges for each year during the 28-year period 1916–1943, inclusive, and an estimate by the debtor's trustees of its prospective earnings in 1944. These are as follows:

Period	Railway operating revenues	Income available for fixed charges	Period	Railway operating revenues	Income available for fixed charges
Year 1916	$8,713,079	$3,969,142	Year 1930	$11,729,811	$1,168,399
Year 1917	8,140,167	3,009,255	Year 1931	9,379,029	731,919
Year 1918	8,841,222	3,848,899	Year 1932	6,720,794	[1] 198,590
Year 1919	10,121,222	3,939,074	Year 1933	6,693,545	[1] 75,982
Year 1920	13,701,191	2,081,700	Year 1934	7,609,612	283,347
Year 1921	13,579,109	1,501,640	Year 1935	7,729,029	[1] 41,873
Year 1922	13,427,625	2,765,277	Year 1936 [2]	8,614,508	1,178,740
Year 1923	16,023,998	3,601,772	Year 1937	9,303,206	736,651
Year 1924	20,106,910	4,564,946	Year 1938	9,594,391	941,998
Year 1925	29,132,738	5,935,408	Year 1939	9,261,367	1,360,008
Year 1926	29,427,460	5,882,154	Year 1940	10,748,838	959,009
Year 1927	17,859,635	1,516,137	Year 1941	11,499,121	1,601,964
Year 1928	13,874,723	1,554,623	Year 1942	20,838,086	7,985,400
Year 1929	13,446,015	1,716,785	Year 1943	32,559,085	9,074,253
Average 1916–43, inclusive				$13,524,126	$2,556,876
Average 20 years, 1924–43, inclusive				14,306,395	2,343,788
Average 10 years, 1934–43, inclusive				12,775,724	2,407,964
Average 8 years, 1936–43, inclusive				14,052,325	2,979,771
Trustees' estimate for year 1944 [2] [3] (6 months' actual)				28,350,000	5,496,642

[1] Deficit.
[2] For the years 1936–40, inclusive, the statements of income available for fixed charges are shown adjusted as described in the report of April 6, 1942.
[3] The trustees' estimate for 1944 includes in miscellaneous deductions from income the sum of $301,250 paid in March 1944 in full settlement of a judgment awarded the trustee under the debtor's equipment trust "D" which was disaffirmed by the debtor's trustees.

The record contains no estimated income account by the debtor's trustees for a "normal year" but at the former hearing in 1941, they furnished a statement of estimated average annual income for a 5-year period 1941–45. At that time the abnormal earnings of the war period were contemplated only to a limited extent compared to the earnings subsequently realized. The witness who testified at the former hearing in support of the estimate stated that very little weight was given to traffic which might result from war conditions. This estimate was discussed in the former report. It is based upon annual operating revenues of $12,300,000 and operating expenses of $9,425,000 and indicates an amount of $1,268,000 available for payment of interest. This estimated income account will be hereinafter referred to as the trustees' forecast.

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At the same hearing, the trustees of the duPont estate also filed estimates of future annual income on four different bases. Operating revenues and expenses and income available for fixed charges as shown by the four estimates are as follows:

	Minimum income year	Normal income year	Maximum income year	Average income 1941–45
Operating revenues	$8,560,000	$10,300,000	$13,150,000	$12,300,000
Operating expenses	6,660,000	7,480,000	9,485,000	8,890,000
Income available for fixed charges	560,000	1,380,000	1,680,000	1,560,000

All of the above estimates, both that of the debtor's trustees and those furnished by the trustees of the duPont estate were discussed in our former report as well as the debtor's past experience, so far as then disclosed by the record, and its future revenue prospects. We concluded that the sum of $1,268,000, as forecast by the debtor's trustees, represented at that time a conservative and reasonably correct estimate of the prospective income available for payment of interest for the average year of the then future period of 1941–45.

Since then, conditions have changed in so many ways that, in our opinion, future income estimates for the near postwar future have become of unusually doubtful reliability. An expert witness. Kennedy, testifying for van B. Wittmann et al. at the hearing in May 1944, presented a forecast for a future normal year. He bases his estimate of annual operating revenues upon that used in the trustees' forecast except for an increase of $250,000 which he made in passenger revenues and which he considers will result from the growth in population and in popularity of the territory served and from the introduction by the debtor of an attractive modern passenger service offered at a low cost. The relative importance of this debtor's passenger revenues in relation to total operating revenues is indicated by its past experience and is reflected in the divisions of total estimated operating revenues by Kennedy as well as by the trustees. Their divisions are upon substantially the same basis, i. e., freight revenues $7,550,000; passenger revenues, about $3,750,000; and other revenues $1,250,000; a total of $12,550,000. In 1941, which, except for a part of December, was prior to the entry of the United States into the world war, passenger revenues were $3,713,000, a fact which in Kennedy's view indicates that his estimate of passenger revenues for a normal year is conservative.

Kennedy bases his estimate of operating expenses for a normal future year on the average incurred in the period 1937–40, inclusive, applying to such base expenses, percentage in increases calculated for such of the expenditures as vary according to the volume of traffic. This computation indicates total operating expenses of $8,621,000 and leaves

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net railway operating income of $2,309,000 after deduction of equipment and joint-facility rents and railway tax accruals, except Federal income and excess-profits taxes.

He then adjusts net railway operating income by adding an estimated annual saving in operating expenses of $200,000 from a prospective abandonment of most of the Okeechobee branch and the coincident construction of the Fort Pierce cut-off, an estimated annual saving of $252,000 from Diesel engine operation, and an estimated annual saving of $151,000 in equipment rents through purchase by the debtor of additional streamlined passenger cars to be used in the New York-Miami service.

He further adjusts net railway operating income by deducting an annual depreciation charge of $430,000 on way and structures not included in the average 1937–40 base and by a further deduction of $177,000 for normal charges to maintenance-of-way expense for rail renewal, very little rail having been renewed in the base period. Kennedy's conclusion as to a conservative estimate for a normal year of income available for fixed charges before Federal income and excess-profits taxes, is $2,363,000. Kennedy emphasizes that his estimate assumes that there will be in the future some kind of standard relation between rates and wages and material costs, his assumption being that future increases in wages and material costs will be met by rate increases.

The necessity for such an assumption to lend value to his forecast was brought out by rebuttal testimony at the further hearing. It was shown that, if the average operating expenses of the 1937–40 period were adjusted to reflect the additional expenditures necessary for the increased costs of labor, ties, and fuel oil, experienced by the debtor in 1941 as compared to the base period, Kennedy's estimated income of $2,363,000 available for fixed charges before Federal income and excess-profits taxes would be reduced to $903,515 and if the 1944 level of such costs were used a deficit of $462,934 would result. While it is possible that the cost of labor and materials prevailing in the current year when the debtor's operating revenues will probably approximate $28,350,000, may decline in a postwar year when business activity is at a lower level and when operating revenues will amount only to the $12,550,000 used by Kennedy in his forecast, these adjustments nevertheless, in our opinion, illustrate the uncertainty which must attach to any attempt under present conditions to predict railway operating expenses in the future.

The effect of the higher costs of operation and taxes currently prevailing over those of last year is shown by the following condensed

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comparative income statements for January–June, inclusive, 1944 and 1943, as reported to the court by the debtor's trustees:

	January–June, inclusive, 1944	January–June, inclusive, 1943
Railway operating revenues	$18,343,109	$18,055,279
Railway operating expenses	9,578,833	8,202,014
Net revenue from railway operations	8,764,586	9,803,365
Railway tax accruals	4,168,922	3,374,113
Railway operating income	4,595,664	6,429,253
Equipment and joint-facility rents (debit)	757,398	816,922
Net railway operating income (income available for interest and amortization of discount on funded debt)	3,841,266	5,611,331

One adverse factor in respect of the debtor's future operating expenses as compared to its past expenses is the present and future necessity of purchasing treated ties almost exclusively, whereas until recently equally durable untreated cypress ties were mostly used, being available at a much lower cost. The supply of cypress ties has been practically exhausted since 1941. One of the trustees of the debtor, Loftin, and his assistant, testifying at the further hearing, both expressed the opinion that the present cost of railroad labor, ties, and fuel oil will not decline in the future so far as can be predicted.

Evidence was introduced at the further hearing with respect to the recent large increase in population of the counties in the State of Florida served by the debtor's railroad and the increase in farm income in the same territory. We believe, however, that it must be recognized that, in the postwar future, the reestablishment of competitive coastwise shipping and a greatly increased trucking of commodities, mostly agricultural in outward movement and consumption goods in in-bound movement, which are now carried by the debtor's railroad, may have an important and adverse effect upon the volume of the debtor's freight traffic.

The record in this proceeding indicates that an abandonment of most of the Okeechobee branch and construction of the proposed Fort Pierce cut-off should result in substantial savings in operating expenses. These projects, however, before being undertaken, must first be authorized by the court (if performed during the bankruptcy period) and by us in a separate proceeding involving the issue of the public convenience and necessity. Assuming, however, that such approvals will be obtained, the annual saving of $200,000 in operating expenses as estimated by the debtor's trustees appears reasonable. Economies in operating expenses should also be realized by increased Diesel-engine operation of trains and in equipment rents by purchase of additional streamlined passenger cars.

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Although recognizing the uncertainty attending an attempt to predict future operating results in view of the unsettled conditions at this time, particularly with respect to their effect upon operating expenses, it is our opinion and we find that assuming completion of the program of extraordinary additions and betterments later described herein, $1,500,000 represents a fair estimate, so far as we can foresee, of the debtor's probable future annual income available for payment of interest in a normal year. While this estimate is considerably less than the annual averages experienced over the last 8-, 10-, and 20-year periods, we have taken into consideration among other things, the following exceptional factors: (1) The dissimilarity in traffic conditions, particularly as to Cuban traffic, as between the earlier years of the period when the Key West extension was being operated and those obtaining after its abandonment in 1935; (2) the nonindustrial nature and restricted extent of the territory served by the debtor's railroad with a consequent limitation of prospective traffic expansion in normal times; (3) the inclusion in the earnings averages of several years of abnormal war traffic, which have expanded the debtor's operating revenues and earnings available for fixed charges to an unusual extent;[4] (4) the uncertainty that must exist whether the present increased labor and material costs now borne by the debtor will materially decline in the foreseeable future, and (5) the uncertainty existing as to the amount of future taxes.

Assets and liabilities.—In the report of April 6, 1942, are stated certain elements of value of the debtor's property as of December 31, 1938, as determined by our Bureau of Valuation in accordance with the methods which we have frequently explained in our valuation reports. These elements of value are as follows: Original cost, except land and rights, $72,231,357; cost of reproduction new, $60,793,892, cost of reproduction less depreciation, $42,117,774; and value of land and rights, $7,515,393. Net additions and betterments from December 31, 1938, to February 28, 1941, as reported by the trustees of the debtor were $1,627,870.

In our former report it is also stated that cost of reproduction less depreciation of the debtor's property plus the value of land and rights, an allowance of $1,572,900 for working capital and net additions and betterments from December 31, 1938, to February 28, 1941 amounts to $52,833,937. The amount of net additions and betterments since that date is not of record.

A consolidated balance sheet of the debtor as of February 29, 1944, shows assets as follows: Investment in road and equipment, $80,230,065; improvements on leased property, $23,661; donations and grants,

[4] For example, the average of earnings available for interest for the 2 years 1942 and 1943 is $8,529,826 while the average for the next preceding 8 years is only $1,119,955.

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$1,019,814 (credit); deposits in lieu of mortgaged property sold, $18,938; miscellaneous physical property, $290,844; investments in affiliated companies, $1,828,750, including $663,223 of stocks, $602,001 of bonds, and $563,526 of investment advances; other investments, $242,210, including $150,636 of stocks and $91,574 of secured obligations; total of investments, $81,614,654; current assets, $36,771,843, including cash $19,748,304, temporary cash investments $3,500,000, special deposits $701,272, traffic and car-service balances (debit) $1,663,753, balances receivable from agents and conductors $293,340, miscellaneous accounts receivable $8,399,621, material and supplies $2,414,940, interest and dividends receivable $18,840, and other current assets $31,774; deferred assets, $18,804; unadjusted debits $20,926,530, including rents and insurance premiums paid in advance $34,589, discount on funded debt $1,954,964, and other unadjusted debits $18,936,977, comprising estimated land-grant deductions for passenger items, estimated passenger revenues due from other lines, estimated revenues accrued, interline ticket reports not rendered, passenger accounting suspense, and minor items; and total of all assets $139,331,831.

On the same date liabilities consisted of capital stock $37,500,000; long-term debt $60,014,000, comprising first-mortgage 4½-percent bonds $12,000,000, first and refunding mortgage 5-percent bonds $45,000,000, equipment obligations $1,114,000, and unsecured nonnegotiable debt of $1,500,000 owing the affiliated Florida East Coast Ferry Company and $400,000 owing the trustees under the will of Mary Lily (Flagler) Bingham, deceased; current liabilities, $18,492,325, consisting of audited accounts and wages payable $1,222,123, miscellaneous accounts payable $138,971, interest matured unpaid $131,740, unmatured interest accrued $145,832, unmatured rents accrued $8,766, accrued 1943 Federal income tax $3,277,285, accrued 1944 Federal income tax $800,000, accrued other taxes $464,594, and other current liabilities $12,303,014, comprising mostly estimated passenger revenue due other lines and also including a judgment (since paid) of $301,250 due New York Trust Company, as trustee, in the suit involving the disaffirmed equipment trust "D" hereinbefore referred to; deferred liabilities $29,516,670, consisting of $28,542,081 of interest in default and $974,589 of other deferred liabilities; and unadjusted credits, $26,782,729, including accrued depreciation on road and equipment $8,993,356 and other unadjusted credits $17,789,373, comprising chiefly unaudited reports of agency-ticket sales; leaving a debit balance of $32,973,893 in earned surplus account.

Conclusion as to amount of permissible capitalization.—In our report in a recent reorganization proceeding, *Missouri Pac. R. Co. Reorganization*, (July 4, 1944), 257 I. C. C. 479, we restated at some length the principles which govern us in determining total permissible capitaliza-

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tion of railroads undergoing reorganization. Those principles apply equally in the instant case. We stated in part:

> A plan of reorganization must serve as a basis for the company's financial structure for the indefinite future and the capitalization which we approve should be such that the reorganized company will be able to meet its obligations and accomplish necessary financing during periods of business depression as well as of high earnings, and such that under all probable conditions it will be compatible with the public interest. Thus it must be based on consideration of earnings over a period long enough to reflect years of both high and low earnings. * * * Reorganizations should remove rather than perpetuate the cause of bankruptcy, and should not be a means of misleading old and new investors. That desired effect can result only if the new securities are so related in character and total amount to the ability of the reorganized company to pay interest and dividends that such securities possess an actual value and not merely one that is speculative.

As we have hereinbefore stated, the total capitalization of $37,000,000 which we fixed for the debtor by our previous report of April 6, 1942, and report and order of August 10, 1942, in this proceeding was based, insofar as our consideration of past earnings of the debtor was concerned, largely upon the earnings subsequent to the abandonment in 1935 of the Key West extension and upon the estimates of future earnings which were of record. We still recognize that the serious declines in the debtor's traffic and other adverse circumstances during the years immediately prior to 1935 which brought about the abandonment of the extension with its consequent advantageous savings in operating expenses, make a consideration of earnings prior to 1936 of little value if confined to the years immediately prior thereto. However, if such earnings are supplemented by a consideration of the debtor's experience over a longer period in the past it would seem that such extended past experience may be of some value in a determination of probable future earnings, although any consideration of them should be qualified by the peculiar conditions which we have already explained.

With this in mind, if we capitalize at three different percentage rates, the debtor's earnings available for payment of fixed charges for the past 20 years, 10 years, 8 years, and also the various estimates of future earnings which are of record, the results are as follows:

Period	Average annual earnings available for fixed charges	Capitalized at—		
		5 percent	4½ percent	4 percent
20 years 1924–43, inclusive	$2,343,788	$46,875,760	$52,084,177	$58,594,700
10 years 1934–43 inclusive	2,407,964	48,159,280	53,510,311	60,199,100
8 years 1936–43 inclusive	2,979,771	59,595,420	66,217,133	74,494,275
Trustee's forecast, 1941–45, inclusive [1]	1,268,000	25,360,000	28,177,778	31,700,000
duPont forecast, normal year [1]	1,380,000	27,600,000	30,666,666	34,500,000
Kennedy forecast, normal year [2]	2,363,000	47,260,000	52,511,112	59,075,000

[1] Introduced in evidence at former hearing held in 1941.
[2] Kennedy's earnings forecast is before Federal income and excess-profits taxes.

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A capitalization at 5 percent of the $1,500,000 of probable normal year earnings available for payment of interest as hereinbefore estimated by us produces $30,000,000, at 4½ percent $33,333,334 and at 4 percent $37,500,000.

Upon consideration of the entire record of this proceeding, including the value of the debtor's assets and its past, present, and probable future earnings considered in light of the particular conditions affecting this debtor's revenues and expenses, it is our opinion and we find that the value of the debtor's property, for the purposes of the reorganization, is $40,500,000 exclusive of the amount of equipment obligations outstanding and that we should modify our previous finding so as to increase to approximately $40,500,000 plus the equipment obligations, the maximum permissible capitalization of the reorganized company.

This amount is exclusive of equipment obligations which should be assumed by the reorganized company. It contemplates, however, a possible lesser amount in the event of any cash distributions to creditors other than such as will be approved in this report, which the court may order to be made prior to consummation of the plan and subsequent to its effective date in accordance with the provisions of the plan as hereinafter described. It also assumes completion of the program for improvements and additions and betterments hereinafter described for payment of which cash is available in the treasury of the trustees of the debtor and will be reserved as hereinafter provided.

CASH RESOURCES AND PROBABLE CASH REQUIREMENTS

As of February 29, 1944, the debtor's trustees had on hand cash or its equivalent in the sum of $19,448,263 and expected that the amount would increase to $20,917,335 as of June 30, 1944, and to $21,836,756 as of December 31, 1944.

At the further hearing the trustees presented a statement showing the estimated cash needed at time of reorganization and for a period of 10 years thereafter. These requirements are summarized as follows: Working capital $500,000; reorganization expenses $500,000; normal additions and betterments $2,500,000, extraordinary additions and betterments (including those chargeable both to capital account and operating expenses) $17,541,215 less depreciation accruals and salvage $14,311,665, leaving a balance of $3,299,550; and deferred maintenance $1,019,400; total $7,818,950. In addition the debtor's trustees have suggested a reserve for income taxes, to cover a possible disallowance on account of the accrual by the debtor of penalty interest (i. e., interest on delinquent interest) for the year 1942 during the subsequent years of 1943 and 1944 instead of during the year in

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which the interest accrued. Moreover, if the general principle of permitting credits for penalty interest should be finally disallowed by the courts (there having been as yet no final litigation on the subject) an additional tax liability amounting to $1,241,120 would be incurred for penalty interest credited by the debtor for 1943 and that being accrued for 1944.

The program of extraordinary additions and betterments for the 10-year period, 1945–54, inclusive, contemplated in the above estimate, involves the expenditure of $11,907,215 of cash chargeable to capital account as compared with which depreciation accruals for the 10 years would amount to $11,941,665, leaving a net credit balance of $34,45[illegible] The portion of the cost of the extraordinary additions and bettermen chargeable to operating expenses would be $5,634,000 and would co[illegible]sist of the major part of the cost of relaying practically the entire li[illegible] with 112-pound rail replacing 90-pound rail laid during 1924, 192[illegible] and 1926. During 1942 and 1943 all of the 112-pound rail allotted t[illegible] the debtor was laid, and it is estimated that the program can be completed by the end of 1948. From the above amount of $5,634,000 is deducted salvage of $2,370,000, leaving a net balance of $3,264,000 chargeable to operating expense. The additional cost of the rail-relaying program chargeable to capital account is $1,043,000.

The additions and betterments chargeable both to capital account and operating expense and the total estimated cash expenditures in connection therewith are as follows: (1) The remaining installments due on existing equipment trusts I and J, $890,000 and additionally the purchase of fifteen 2000-horsepower Diesel locomotives at an estimated cost of $2,649,780, 20 streamlined passenger train cars at an estimated cost of $1,779,435 and 100 100,000-pound capacity all-steel boxcars at an estimated cost of $500,000, all of these equipment purchases having been authorized by the court with a direction to the trustees to purchase the boxcars for cash; (2) a rail-relaying program to cost $6,677,000; (3) new bridges to replace obsolete ones $500,000; (4) Fort Pierce cut-off $960,000; (5) new stations and terminal facilities $3,335,000; and (6) shop machinery $250,000, total $17,541,215. It seems established from the record that all of these additions and betterments are immediately required and that the work should be performed as speedily as is economically possible. The debtor's trustees estimate that they can all be completed and paid for by the end of 1948 with the exception of equipment-trust maturities extending over a remaining 6 years, the remaining installments amounting to an estimated total of $2,960,320, and with the further exception of the sum of $1,635,000 which would remain to be paid for new stations and terminal facilities subsequent to 1948.

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As indicated by cross-examination of trustee Loftin, if a modification of his estimate of a requirement of $7,818,950 of cash for the next 10 years is made by limiting the requirement to a 4-year period extending only through 1948, and on the premise that all new equipment will be paid for in cash instead of purchased by equipment obligations, then the cash requirement would be $11,599,756 plus the additional minimum reserve of $869,816 for income taxes as above explained. Upon this basis, there is necessarily omitted from consideration the large annual accruals of depreciation totaling $7,239,990 in the remaining 6 years of a 10-year period, while cash payments required during the same 6 years would amount to only $4,595,320 being mostly equipment-trust maturities on the new equipment to be acquired.

In our opinion, the debtor should have no difficulty in financing on a favorable basis the purchase of at least the greater amount of its new equipment except as has been otherwise ordered by the court by means of equipment obligations payable in installments over a period of 10 years, and we believe that other uses of the debtor's available cash, which we will hereinafter refer to, should have preferment over a use of those amounts in purchasing the equipment all for cash. On the assumption that the new equipment will be paid for in installments and taking into consideration the minimum estimated reserve of about $870,000 for income taxes, it is our opinion and we find that a total of not less than $8,700,000 of the cash now on hand, should be required, as a provision of the plan, to be set aside and reserved substantially for the purposes described hereinabove, the use of the fund to be as directed by the trustees of the debtor upon order of the court or, as to such part thereof as may not be expended or appropriated at the time of consummation of the plan, by order of the board of directors of the reorganized company.

While the income tax reserve may prove inadequate in case the general principle of allowance of credits for penalty interest should be ultimately rejected by the courts, we have taken into consideration the fact, not otherwise allowed for in making our estimate, that the debtor's revenues and expenditures may, for some time in the future, permit further accumulations of cash balances. One of the debtor's trustees testified, however, that in March 1944, the debtor used up its "carry over" losses for 2 years thereby exhausting its excess-profits tax credit and that the consequent greater Federal taxes which it must pay hereafter will afford it no chance of again accumulating cash as it did in the years 1942 and 1943 even though revenues and earnings before such taxes continue at a high level.

To summarize, we find that cash and its equivalent which probably will be available at the end of 1944 will approximate $21,837,000, that cash of not less than $8,700,000 should be reserved for the purposes

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above described in this section of the report, and that about $13,137,000 of cash will remain to be applied to other purposes hereinafter discussed.[5]

The existing lien dispute between the first-mortgage bondholders and first and refunding mortgage bondholders involves a question which if a decision is necessary, in the circumstances of this case, should be litigated in the courts. The judge in his opinion accompanying the order of the court referring this reorganization proceeding back to us for further consideration expressed the opinion that a discharge of the first mortgage by payment in cash "would render unnecessary a judicial determination of existing lien priorities, now in dispute, thus avoiding extended and costly litigation, which would further delay this reorganization." In the proceedings before us only one of the parties disapproved satisfaction in cash of the first mortgage.

The record indicates that by far the greater part of the debtor's earnings accrue from operation of the main line. The party, Hamilton, who objects to payment of the first mortgage, contends that a considerable amount of the proceeds from the sale by the debtor of its first and refunding mortgage bonds was used for improvements and additions and betterments to the main line and that such improvements and additions and betterments are thereby subject to a first lien under that mortgage. Whether or not this position is sound, we believe the record is clear that the major part of the property contained in the main line is subject to the first lien of the first mortgage. We conclude and find that the approved plan should provide for a payment in cash of the principal of the first mortgage and all accrued interest to date of such payment.

This will leave about $1,137,000 of cash which, under the plan, could be distributed to holders of the first and refunding mortgage bonds. While we could specify such distribution as a part of the plan of reorganization, we recognize that, under present conditions, there may be substantial changes in the debtor's cash balances from time to time prior to consummation of the plan. We also recognize the possibility that we have underestimated the cost of the contemplated extraordinary additions and betterments and other cash requirements upon reorganization and the amount of cash which should be reserved therefor.

It is our opinion and we find that the matter of the amounts of any cash payments which the first and refunding bondholders should re-

[5] The trustees, in their report for the month of October 1944, show a cash balance of $22,829,550 at the end of October. In a statement of cash position filed as an exhibit the trustees estimated taxes payable in November 1944 (other than income and excess-profits taxes) as $540,000. The court authorized the payment of $270,000 interest on the debtor's first-mortgage bonds due December 1, 1944.

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ceive prior to consummation of the plan and within the framework of the plan which we shall approve, should be left to the discretion of the court. In reaching its decisions, the court will have the benefit of a knowledge of conditions prevailing at the time. In view of the amount of the claim of these bondholders, and the extent of deficiency in complete satisfaction of the claim out of the assets of the debtor, we find that any such cash distributions or any appropriations of such cash made by order of the court entered prior to the effective date of the plan, should not operate to decrease the amounts of new securities distributable to them under the plan nor be credited to any income accrued thereon after the effective date of the plan. Any such cash distributions or any appropriations of such cash made upon order of the court entered on or subsequent to the effective date of the plan should be applied first to payment of interest on the new first-mortgage series A bonds accrued since the effective date of the plan and second, to decrease the total principal amount of new first-mortgage series A bonds, which are otherwise issuable under the plan pro rata to holders of the debtor's first and refunding mortgage bonds.

EFFECTIVE DATE

In the plan approved by us on August 10, 1942, we provided that the reorganization managers should fix, in the light of the time when the reorganization securities will be available for delivery, the date as of which claims shall be capitalized in new securities, providing that such date should not be earlier than January 1, 1943, nor later than January 1, 1944. The St. Joe Paper Company requested that the latter date be changed to January 1, 1945, the protective committee for first and refunding bondholders suggested that the date be not earlier than July 1, 1944, and Hamilton that it be changed to July 1, 1944. Other proposals also were made.

In other cases where plans have been returned by the courts, we have changed the effective dates to dates nearer the time when the plans can be consummated. If this plan is consummated, the time required for court approval, submission to creditors, confirmation by the court, and final consummation, make it unlikely that it can become effective before January 1, 1946. In that case, the court will have approximately 1 year in which to supervise the improvement program described hereinbefore. We find that the effective date should be January 1, 1946.

NEW CAPITAL STRUCTURE

As hereinbefore stated, we approve the satisfaction in cash of the outstanding $12,000,000, principal amount, of the debtor's first-mortgage bonds. We have also approved a total permissible capitalization

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f not to exceed $40,500,000, exclusive of equipment obligations, subect, as above stated, to a possible decrease in the amount thereof as of he time of consummation of the plan, in the event of further cash istributions to creditors upon orders of the court entered after the ffective date of the plan. We have, in connection with our discussion f the amount of capitalization of the reorganized company, stated he factors which in our opinion, render uncertain any estimate of uture earnings of the debtor upon a return of peacetime conditions. t is our opinion, and we find that, other than equipment obligations, hich will be assumed by the reorganized company, its capitalization pon consummation of the plan should consist of $20,250,000, principal mount, of first-mortgage 75-year income bonds bearing contingent nterest at the rate of 4½ percent per annum, and 202,500 shares of noar-value common stock. This should result in a well-balanced corpoate structure and permit of possible future capital financing without hereby unduly distorting the proportions of either debt obligations r stock which would be outstanding.

By January 1, 1946, the effective date of the plan, the principal mount of the present outstanding equipment trusts I and J should be educed to about $666,000 and the interest to about $19,555. The nprovement program contemplates the purchase of Diesel engines and assenger cars at a total cost of approximately $4,430,000. It is not ow determined how the acquisition of this new equipment will be nanced or the interest rate of any equipment obligations, which may e issued in respect thereof. Assuming that a 10-percent cash payment ould be required and that equipment obligations bearing 2 percent er annum interest would be issued for the remainder of the purchase rice, the annual interest payable thereon at the beginning would be 79,740. Aside from the issuance of new equipment obligations, the aximum capitalization and annual chares of the reorganized comany upon consummation of the plan, would be approximately as ollows:

	Capitalization	Fixed requirements	Contingent requirements
xed-interest debt:			
Equipment obligations	$666,000	$19,555	
ontingent-interest debt:			
Capital fund			[1] $200,000
First-mortgage 75-year 4½-percent income bonds	20,250,000		911,250
nking fund			101,250
Total debt	20,916,000	19,555	1,272,500
ommon stock:			
(No par-value at $100 per share)	20,250,000		
Totals	41,166,000	19,555	1,272,500

[1] 2 percent of total annual operating revenues of $13,000,000.

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We have hereinabove stated that we consider $1,500,000 to be a fair estimate of the debtor's earnings available for payment of interest in a normal year of the future. In any year in which such an amount is realized fixed charges would be covered 76.71 times and all charges 1.21 times. The coverage of all charges would be increased by any amounts charged to operating expense for depreciation since these charges would, under the plan, be deductible from the amount otherwise included in annual charges for the capital-fund payment for the year. On the other hand, fixed charges for the year would be increased in the amount by which equipment-obligation installments would exceed the $19,555 shown above. We conclude and find that the plan will provide adequate coverage of fixed charges by the probable earnings of the debtor available for the payment thereof.

RIGHTS OF CREDITORS AND STOCKHOLDERS

The obligations on all equipment obligations of the debtor and of the debtor's trustees outstanding on the date of consummation of the plan should be assumed by the reorganized company. We find that when so treated the interests of the holders of such claims will not be materially and adversely affected by the plan.

The debtor's outstanding first-mortgage 4½-percent bonds mature on June 1, 1959, and are noncallable. Interest on the bonds has been and is currently paid when due, and none is in arrears. All representatives of first-mortgage bondholders, including the trustee under the mortgage, request that these bonds be paid in full in cash as part of the plan of reorganization together with interest to date of payment, and they have agreed to accept this treatment in full satisfaction of their claims against the debtor. We have hereinbefore approved this treatment of the first-mortgage bondholders.

The debtor's first and refunding mortgage 5-percent bonds, due 1974, are outstanding in the principal amount of $45,000,000 and as of January 1, 1942, interest accrued and unpaid thereon amounted to $24,375,000, as stated in our report of April 6, 1942. Since then three interest coupons totaling $3,375,000 have been paid, and the amount of interest which will be accrued and unpaid as of January 1, 1946, the effective date of the plan, will be $30,000,000, and the total claim on that date will be $75,000,000, assuming no further interim payments of interest are made prior thereto. For the reasons stated in our report of April 6, 1942, we affirm the finding that claims of unsecured creditors whose claims are not entitled to priority and the equity of the stockholders of the debtor are without value, and that they should not be permitted to participate in the plan of reorganization.

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Since the holders of the first and refunding bonds constitute the only class of secured creditors other than the holders of equipment obligations and first-mortgage bonds, it follows that, upon satisfaction in full of the claims of the first-mortgage bondholders and subject to the rights of the holders of equipment obligations assumed by the reorganized company and to the rights of holders of the priority claims found not to be affected by the plan, the first and refunding mortgage bondholders are entitled to all the assets of the debtor. There should be distributed to them all new securities to be issued upon consummation of the plan, other than equipment obligations. We find that this will constitute the full equitable equivalent of the value of these creditors' claims, payable out of the available assets of the debtor.

The plan should contain the following additional provision:

The debtor as reorganized, or the transferee of the property of the debtor in connection with any settlements of transportation accounts between the United States and the debtor or the reorganized company, shall be required to recognize and pay or allow for any and all sums, determined through audit, adjustment, compromise, or litigation, as due the United States by virtue of the provisions of section 322 of the Transportation Act of 1940, 54 Stat. 955, for overpayments made prior to the date of confirmation of a plan of reorganization without requiring proof thereof in this reorganization proceeding and without prejudice by reason of such sums not having been proved herein, with the same relative priority as they now have with respect to other obligations of the debtor.

PETITION OF UNITED STATES TRUST COMPANY OF NEW YORK

This trust company is trustee under two mortgages on the properties of the Jacksonville Terminal Company, the terminal facilities of which at Jacksonville, Fla., are used by the debtor and the bonds of which are guaranteed by the debtor together with other joint owner-tenants.

In the plan previously approved by us it is provided:

ASSUMPTION OR DISAFFIRMANCE OF LEASES OR CONTRACTS

The reorganized company shall be deemed to have assumed such of the contracts of the debtor which are executory in whole or in part, including any executory leases and liabilities under guaranties, as shall have been affirmed by the trustees of the estate of the debtor in the reorganization proceeding with the approval of the court, and also any executory contracts made by the trustees of the estate of the debtor with the approval of the court in the reorganization proceeding which, by their terms, do not terminate at the conclusion of the reorganization proceeding. The interests of the holders of such claims will not be materially and adversely affected by the plan.

The trust company urges us expressly to provide, as a part of the plan of reorganization, that the executory contract for use of the Jacksonville terminal facilities be affirmed in its entirety. In sup-

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port of its request, the trust company urges that the use of the terminal facilities is necessary for the operation of the debtor's railroad, that the operating agreements for the use of the terminal facilities must be adopted or rejected in their entirety, and that fair and equitable treatment of the Jacksonville Terminal Company bondholders and of the other owner-tenant lines requires such affirmance. There is no indication of record that either a partial or complete disaffirmance of these agreements is contemplated.

In view of that fact, it is our opinion and we find that the affirmance or disaffirmance of this contract of the debtor by its trustees can properly be left to the discretion of the court. The petition accordingly will be denied.

MORTGAGE PROVISIONS

Because of the changed financial condition of the debtor since our approval of the plan on August 10, 1942, particularly in respect of the amount of cash on hand available to be used for payment of the first-mortgage bonds and for extraordinary additions and betterments, as well as the fact that the new first-mortgage bonds to be issued in the reorganization will bear contingent instead of fixed interest, will be issued for a different purpose, will be of a greater total amount and have a more remote maturity date, and also in view of the fact that the new first mortgage will constitute the only mortgage lien upon the debtor's properties upon consummation of the plan, extensive modifications are required of the provisions of the new first mortgage, as stated in our former report.

The extent of the properties to be excluded from the first lien of the new mortgage should be more restricted since there will be but one mortgage. The annual payments into the sinking fund should accrue from the date of consummation of the plan instead of after a period of 10 years therefrom since the cash position of the debtor now makes the deferment unnecessary. There is no necessity for retention of the provision for the issue of so-called "free bonds," and other changes are required, which hereinafter will be indicated. The new first mortgage should contain provisions substantially as follows:

The first mortgage should constitute a direct first lien subject only to liens upon equipment, on all the properties and assets of every kind owned by the reorganized company upon consummation of the plan, including without limitation, securities, free equipment, and the reorganized company's equity in such equipment as is subject to equipment obligations, except, however, such cash accounts receivable or other current assets which are not customarily subject to the lien of a first mortgage and such property or assets not necessary for the operation

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of a railroad as the reorganization managers may determine should not be so subject; and should also constitute a first lien, in such manner and with such exceptions as may be provided in the mortgage, upon all property of whatever nature acquired by the reorganized company or its successors or assigns after the effectuation of the plan, subject only to such encumbrances or purchase-money liens as may exist or be created at the time of acquisition.

The principal amount of bonds to be issued under the first mortgage should be unlimited, subject to mortgage provisions and to such limitations, if any, as may be prescribed by the laws of the State or States in which the reorganized company shall be incorporated.

First-mortgage bonds may be issued from time to time in different series, subject to such limitations and restrictions as may be specified in the first mortgage, and to such conditions as may be imposed by us at the time or times of issue or other analogous authority pursuant to provisions of the law, but with respect to the lien of the first mortgage all bonds of every series should be equally secured.

First-mortgage series A bonds in a principal amount not exceeding $20,250,000 should be authenticated and delivered in the reorganization ratably to holders of the now outstanding first and refunding mortgage 5-percent bonds of the debtor. The series A bonds should be dated January 1, 1946, mature 75 years after date, bear contingent interest at the rate of 4½ percent per annum, due and payable as hereinafter provided, and should be redeemable in whole or in part at the option of the reorganized company, except for the purposes of the sinking fund (hereinafter described), on May 1 in any year on 30 days' notice at their principal amount and accrued interest, including interest from January 1 to redemption date of the year in which redeemed plus a premium on such principal amount as follows: Five percent of their principal amount if redeemed on or before January 1, 1961, 4 percent if redeemed after January 1, 1961, and on or before January 1, 1976, 3 percent if redeemed after January 1, 1976, and on or before January 1, 1991, 2 percent if redeemed after January 1, 1991, and on or before January 1, 2006, 1 percent if redeemed after January 1, 2006, and on or before January 1, 2016, and thereafter at the principal amount thereof.

Contingent interest on the series A bonds at the rate of 4½ percent per annum should (up to the limits of accumulation hereinafter described) become due as a debt on December 31 in each year if, or to the extent that, such interest is earned and income is available therefor under the provisions hereinafter described for determination and application of available net income, except that interest at the rate of 4½ percent for the year 2020 should be paid January 1, 2021, whether

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or not earned. Otherwise, interest, if so earned and available should be payable on May 1 of the next succeeding year or thereafter, as provided below. Unpaid interest should accumulate up to the maximum amount of 45 percent, but no more. If such maximum accumulation is reached, no further accumulation shall be made unless the amount of the accumulated interest is later reduced, in which case unpaid interest accruing after such reduction in accumulated interest may again be accumulated from time to time, but the total accumulation should never exceed a maximum of 45 percent. Accumulated interest should be mandatorily payable on May 1 of any subsequent year (*a*) whenever and to the extent that there is available net income for the preceding calendar year remaining after the prior deductions made pursuant to the provisions hereinafter described for determination and application of available net income, or (*b*) in any event (whether earned or not) at the maturity or on redemption of the income bonds. Payment of interest in any year on the series A bonds should be considered as applied to interest accrued for the last preceding calendar year before being applied to accumulations. The board of directors of the reorganized company at any time in its discretion should be permitted to pay out of any funds lawfully available therefor, any interest due or accrued on the series A bonds, even if not earned.

No interest should be paid on series A or other income bonds in any year if the amount would be less than one-fourth of 1 percent, and all payments should be in multiples of one-fourth of 1 percent. Any excess available for interest but not paid because of the foregoing provision, should be reserved and added to the income applicable to interest on the income bonds for succeeding calendar year or years. If there should be outstanding first-mortgage bonds of different series bearing contingent interest, the amount applicable to interest on such bonds should be distributed among the respective series in proportion to the unpaid interest at the time accumulated on the bonds of such series, respectively.

The first mortgage should provide for a sinking fund for series A bonds, the annual payments to be made on May 1, beginning May 1, 1947, and to be equal to one-half of 1 percent of the largest principal amount of series A bonds at any time previously authenticated and delivered, if sufficient available net income for the previous year is available for such purpose after the deductions made pursuant to the provisions of the subdivision hereinafter included in this plan and entitled "Determination and application of available net income." Such sinking fund should be applied to the retirement of series A bonds by purchase in the open market or by call for tender (but in no case

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at a price exceeding their redemption price) and to the extent not so applied, to the redemption of bonds, as hereinafter provided. Bonds should be called for redemption by lot. All series A bonds acquired for the fund should be retained in the sinking fund and interest paid thereon to the same extent as if the bonds were outstanding, such payments of interest into the sinking fund on such bonds to be additional to the regular sinking-fund payments. For the purposes of the sinking fund, series A bonds should be redeemable at any time on 30 days' notice at their principal amount and accrued interest plus a premium on such principal amount as follows: Two and one-half percent of their principal amount if redeemed on or before January 1, 1961, 2 percent if redeemed after January 1, 1961, and on or before January 1, 1976, 1½ percent if redeemed after January 1, 1976, and on or before January 1, 1991, 1 percent if redeemed after January 1, 1991, and on or before January 1, 2006, one-half of 1 percent if redeemed after January 1, 2006, and on or before January 1, 2016, and thereafter at the principal amount thereof. The reorganized company should be permitted to deliver to the mortgage trustee in lieu of all or any part of cash payments into the sinking fund, bonds retirable out of the fund, bearing all unmatured coupons, such bonds to be taken at their cost to the company, (exclusive of accrued interest) as certified by the company to the trustee at the time of delivery of such bonds, or at the redemption price, on the first day of May in such calendar year, whichever may be lower.

The mortgage should permit additional first-mortgage bonds, other than series A, to be issued from time to time in different series subject to limitations and restrictions to be specified in the mortgage. Such additional bonds should be payable on such date or dates, should be issued in such denominations, should bear interest either fixed or contingent at such rates, and should contain such provisions in regard to redemption, conversion, taxes, place or places, and money or moneys of payment, registration and sinking funds and should have such other characteristics as may be prescribed by the board of directors of the reorganized company at the time of issue, subject to authorization or approval by us or such other governmental body as may, at the time, have jurisdiction in the premises; provided, that no additional bonds should be issued bearing fixed interest (except "emergency bonds" hereinafter described) without the prior approval of two-thirds of those holders of series A bonds who are present in person or by proxy at a meeting called by the trustee of the first mortgage for such purpose, each $100, principal amount, of bonds there represented being entitled to one vote; and provided, further, that emergency bonds (hereinafter provided for) should be permitted to be issued without such prior approval of the holders of series A first-mortgage bonds.

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The first mortgage should permit the authentication of additional bonds from time to time by the reorganized company to provide for, or to reimburse the reorganized company for, not exceeding 75 percent of the net expenditures for additions to, or extensions or improvements of, the property of the reorganized company made after the effective date of the plan, which under our accounting rules or those of other public regulatory authority having jurisdiction in the premises at the time in force, are properly chargeable to capital account; provided, however, that if any additional first-mortgage bonds shall be issued to provide for, or to reimburse the treasury of the reorganized company for, moneys expended for the acquisition of railroad equipment, a sinking fund shall be established, in addition to any other sinking fund which may be provided for such bonds, payable in equal annual installments in an amount sufficient to retire, at par, within the expected efficient service life of such equipment, in no case to exceed 15 years, a principal amount of first-mortgage bonds equal to the principal amount of bonds so issued; and provided, further, that no bonds should be issued in respect of expenditures for improvements or additions and betterments for which cash for payment thereof is included in the fund of not less than $8,700,000, which we have found should be reserved, as a provision of the plan, for the purposes hereinabove set forth.

We include the above last proviso for the reason that the maximum capitalization which we have fixed for the reorganized company is on the assumption of a fulfillment of, and completion of payment for, the program of improvements and additions and betterments which we have hereinbefore described. Were these additions and betterments not urgently and immediately required, cash additional to that which may be distributed under the plan to the first and refunding mortgage bondholders in part satisfaction of their claims might properly be paid to them in the reorganization, instead of a distribution to them of the additional securities which they will receive in lieu thereof. It follows that the securities which they will receive should not be subordinated to or diluted by the future issuance of new securities in respect of these improvements and additions and betterments.

No bonds issued under the first mortgage should be pledged if as a result of such pledge the aggregate principal amount of all first-mortgage bonds then under pledge in excess of the principal amount of all loans so secured, will exceed 10 percent of the total principal amount of all first-mortgage bonds then authenticated and uncanceled, other than bonds held in sinking funds.

The first mortgage should also contain a provision for the right to authenticate and deliver "emergency bonds," bearing either fixed or contingent interest, free from the restrictions hereinbefore set forth,

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provided that their authentication and delivery is authorized by a resolution of two-thirds of the board of directors to the effect that funds are needed and cannot be obtained except upon sale, exchange, or pledge of the bonds applied for. Any such emergency bonds not retired within 2 years from the date of authentication and delivery should be required to be retired by means of an annual sinking fund equal to 5 percent of the amount of such bonds issued, and the principal amount of such emergency bonds outstanding shall not exceed at any one time either $1,000,000 or 2 years' fixed charges of the reorganized company, as that term is used in our uniform system of accounts for steam railroads, whichever sum shall be the greater. If and when emergency bonds so authenticated and delivered are retired, they should be returned by the reorganized company to the trustee under the first mortgage and canceled, and no bonds should be authenticated and delivered to refund the bonds so canceled. After such cancelation, but not before, the bonds so canceled should be deemed never to have been authenticated and delivered for the purpose of determining the right of the reorganized company to the authentication and delivery of emergency bonds or other bonds or withdrawal of deposited cash under the provisions of the first mortgage.

Additional limitations or restrictions on the issuance of first-mortgage bonds may be made by a supplemental indenture.

The first mortgage should contain provisions giving to the holders of 66⅔ percent in aggregate principal amount of outstanding bonds to be affected by the business to be submitted to the meeting, the power by resolution at a bondholders' meeting to take the various actions therein specified including the power to make any modification in or addition to the provisions of the first mortgage, or the rights and obligations of the reorganized company or the rights of the holders of the bonds of all or any series, provided that the bondholders shall have no power to (*a*) extend the maturity of any bonds, or reduce the rate of interest thereon, or otherwise modify the terms of payment of principal (other than a modification of the provisions of any sinking-fund or redemption provisions of bonds) or interest, without the consent of the holder of each bond so affected, or (*b*) effect a reduction of the percentage required for any action authorized to be taken by the bondholders, provided that application of the provisions of this paragraph shall be conditioned upon our approval of any proposed change of the sinking-fund provisions, or any other provision of the first mortgage, incorporated therein pursuant to the requirements of this plan. In case any series of bonds is affected differently from any other series by the action proposed, the vote of holders of 66⅔ percent in aggregate principal amount of each such series so differently affected

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shall also be required. Provision shall be made whereby bondholders may vote at such meeting by proxy. Notwithstanding the limitation in clause (*a*) of this paragraph the first mortgage should contain a provision in such form and substance as may be determined by the reorganization managers with the approval of the court, that the mortgage may at any time, with our approval or that of such other regulatory body as may at the time have jurisdiction in the premises, be modified by the concurrent action of the reorganized company and of the holders of not less than 75 percent in principal amount of all bonds of the mortgage outstanding at the time of such votes so as to postpone the time or times of payment of any fixed interest or accumulations of contingent interest, either before or after the interest is due, or the principal of any or all series of bonds of the mortgage, either before or after maturity, whether bearing fixed or contingent interest which at such time may be outstanding, provided that the payment of the principal of the bonds may not be postponed for a longer period than 20 years from the maturity date designated in the bonds and that the maturity of interest on the bonds may not be postponed for a longer period than 5 years, but in no event beyond the maturity date of the principal of the bonds designated in the bonds unless such maturity be postponed, in which event the maturity of interest on the bonds may not be postponed beyond the extended maturity date of the principal.

CAPITAL FUND

There should be created by appropriate covenants in the first mortgage of the reorganized company a capital fund which should be segregated from other funds.

Under the terms of the plan approved by our reports of April 6 and August 10, 1942, it is provided that annual payments into the capital fund should amount to 2 percent of total railway operating revenues for each of the first 10 income periods and to the extent of 1 percent for each period thereafter, subject to increase to a total of 2 percent in any year when the board of directors of the reorganized company may determine.

The amounts of these payments were determined in the light of the debtor's financial prospects and requirements for extraordinary additions and betterments as of that time. The improved financial condition of the debtor now permits making the various improvements and additions and betterments as soon as economically possible and financing them largely out of cash on hand supplemented by depreciation accruals in the years during which the work is to be performed. These improvements and additions and betterments should result in economies of operation and it is our opinion and we find that annual

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capital-fund payments should, if earnings are available therefor, be made for each period after consummation of the plan in an amount equal to 2 percent of total operating revenues for the period, such payments to begin with the calendar year in which the plan is consummated, but to be made only after the payment of all prior charges as provided hereinafter in the provisions for determination and application of available net income.

Changes in our accounting classifications since our former reports as a result of which the debtor now charges as operating expense depreciation on roadway and structures, also require further revision of the provisions of the plan with respect to the capital fund.

The plan should contain the following provisions regarding the capital fund, which include the necessary modifications above referred to:

The net income available for payments each income period into the capital fund beginning with the calendar year during which the plan shall be consummated, should be determined as provided hereinafter in the section entitled "Determination and application of available net income," and should amount to 2 percent of total railway operating revenues for each such period.

The appropriation for the capital fund should be reduced by the amount of any charges for depreciation of roadway and structures made in each income period, less the cost of replacement of depreciable property during each period, including any costs represented by credits to account 716, material and supplies, on account of such replacements, and should be increased by the amount, if any, by which available net income for the last preceding period shall have been less than the amount required for the capital expenditures fund as aforesaid, provided, however, that:

(*a*) The capital fund should be applied as shall be from time to time determined by the board of directors of the reorganized company, either to provide for or to reimburse the treasury of the reorganized company for all or any part of the net charges to the investment account (as defined under our classification of income, profit, and loss, and general balance sheet accounts for steam roads, accounts Nos. 701, Investment in road and equipment, 702, Improvements on leased railway property, and 705, Miscellaneous physical property) of the reorganized company not otherwise financed, or not otherwise provided for, with proper adjustment for use by the reorganized company of second-hand material, donations, and other items not involving a cash outlay, or the equivalent thereof.

(*b*) To the extent that expenditures are so provided for or reimbursed out of the capital fund, the reorganized company shall not thereafter have the right to issue any bonds or other evidences of in-

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debtness or withdraw deposited cash, to capitalize or reimburse such expenditures, provided, however, that such expenditures (if for purposes for which first-mortgage bonds may be issued) may, within such limits, if any, as may be specified in the first mortgage be used to supply, in whole or in part, the excess of capital expenditures required to be certified under such mortgage over the principal amount of the bonds that may be issued or the amount of deposited cash that may be withdrawn under the terms thereof.

(*c*) Any amount which is available for or set aside in the capital fund under the foregoing provisions may be used, in addition to the uses hereinbefore allowed, to retire first-mortgage bonds, to pay any debt at the maturity thereof, or to pay any accumulations of interest on first-mortgage bonds, but any amount so available which is not expended, or appropriated to meet liabilities incurred before the end of the year in respect of which it shall have been set aside or within 3 months thereafter, may be accumulated up to $300,000, but any amount in excess of such accumulation shall not be carried forward. If any sums set aside into the capital fund are used to pay any contingent interest charges, no dividends shall be paid on the stock of the reorganized company until the capital fund has been reimbursed for the funds so used.

DETERMINATION AND APPLICATION OF AVAILABLE NET INCOME

Available net income should be determined for each calendar year (except that the first period may be less than a calendar year in the event the plan should be consummated on some date other than January 1), on or before May 1 of the following year beginning with the calendar year in which the plan shall be consummated.

The period for which such available net income shall be determined is herein designated as the income period.

Available net income for each such income period should be determined by deducting all fixed charges of the reorganized company accruing during such income period from the income of the reorganized company available for fixed charges for such income period (determined in accordance with our accounting rules or those of other Federal authority having jurisdiction in the premises at the time in force, or, to the extent not governed by such accounting rules, in accordance with sound accounting practices).

Available net income should be determined for each such period as the accounts are stated on the books of the reorganized company when its accounts are closed for such period, without adjustments, except that (1) if in respect of any period the available net income is a deficit, the amount of such deficit shall be carried forward and be deducted in determining available net income for the succeeding

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period or periods until such deficit (or accumulated or remaining deficits) be extinguished by earnings, which, in the absence of such deficit or deficits, would be available net income; and (2) any adjustments necessary to correct the income accounts of any prior period should be made by appropriate entries which may either be made in the accounts of the current period or, in the discretion of the board of directors of the reorganized company and subject to our approval or that of such other governmental agency, if any, as at the time may have jurisdiction over the accounting practices of the reorganized company, may be made, in whole or in part, in the accounts of any subsequent period or periods, and any such debits or credits made in the accounts of any period to adjust entries in the income accounts of prior periods should be treated as income items for the period in which entered on the books, whether cleared through income or profit and loss accounts; and (3) in computing such available net income no amounts should be deducted for retirements of nondepreciable property.

Available net income for each income period should be applied to the following purposes and in the following order:

(*a*) To the extinguishment of any deficit or deficits in available net income of the reorganized company for prior income periods.

(*b*) To the payment of any sinking-fund payments which may be established for retirement of any first-mortgage bonds issued for the acquisition of railroad equipment.

(*c*) To the payment of the annual installment required for the capital fund and any accumulation thereof, as hereinabove provided.

(*d*) To the payment of currently payable interest on first-mortgage contingent-interest bonds.

(*e*) To the payment of current sinking fund requirements and accumulations thereof on series A first-mortgage contingent-interest bonds.

(*f*) To the payment of accumulations of interest on contingent-interest first-mortgage bonds.

(*g*) To dividends on stock or to any proper corporate purposes as the board of directors of the reorganized company may determine.

If any sinking fund, other than for retirement of first-mortgage bonds issued to acquire railroad equipment, should be provided for any future issue of first-mortgage bonds of other series than the series A bonds to be issued in the reorganization, annual payments into such fund should have such precedence in the application of available net income as the board of directors of the reorganized company may then determine.

In case of any unification of the properties of the reorganized company with the properties of any other company as a result of which

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it becomes desirable to combine the earning of such properties and eliminate separate accounts, income available for fixed charges for the purpose of computing available net income applicable to interest or sinking fund for the income bonds for any succeeding fiscal year should be determined in any manner approved by holders of income bonds as follows: (*a*) Upon the vote or written consent of the holders of 75 percent of the principal amount of income bonds outstanding at the time, or (*b*) if a meeting shall be held upon at least 3 weeks' notice and if at such meeting the holders of less than 75 percent of the principal amount of income bonds outstanding at the time shall be present in person or by proxy, and if such meeting shall be adjourned for at least 3 weeks, and if at such adjourned meeting there shall again be less than the holders of 75 percent of the principal amount of income bonds present in person or by proxy, and if such meeting shall again be adjourned for at least 3 weeks, then at such second adjournment the vote of 75 percent of the principal amount of the income bonds present in person or by proxy at the meeting shall constitute the approval of the holders of the income bonds for the purposes of this paragraph.

CAPITAL STOCK

There should be authorized and issued 202,500 shares of common capital stock of the reorganized company without par value, which should be distributed in the reorganization pro rata to the holders of the first and refundning mortgage bonds. Holders of such stock should be entitled to 1 vote per share on all matters. Upon the termination of the voting trust, hereinafter described, each shareholder should be given the right of cumulative voting in the election of directors.

MANAGEMENT AND CONTROL; VOTING TRUST; DIRECTORS AND REORGANIZATION MANAGERS

At the time of our approval of the plan in 1942, the 5-percent committee represented over 51 percent in principal amount of first and refunding mortgage bonds outstanding. Since then the St. Joe Paper Company, controlled by the trustees of the duPont estate, by purchase of these bonds, in large part from owners who had deposited their bonds with the 5-percent committee, has acquired a principal amount of $23,259,000 or over 51 percent of the entire issue. Under the plan as modified herein, all securities (other than equipment obligations) of the reorganized company, which will be issued in the reorganization are to be distributed to present holders of these bonds. As of May 5, 1944, the 5-percent committee had on deposit only $1,329,000, principal amount, of the bonds.

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It is thus apparent that the duPont estate will have control of the reorganized company.[6] Its status in that respect should be recognized by modifications of the plan to reflect the new control. This does not mean, however, that minority interests should not have a voice in the management of the reorganized company through representation on its board of directors and in the appointment of reorganization managers. It is our opinion that a voting trust for the common stock issued in the reorganization and all other voting stock thereafter issued by the reorganized company during the continuance of the voting trust, should be established and that the minority stockholders should be represented in the appointment of the voting trustees. After the termination of the voting trust, minority stockholders would, under the provisions for the issue of common stock, have the right of cumulative voting for directors as hereinabove provided in the section of this report approving the issuance of the new stock.

The specific contentions of the various parties as to the nature and extent of the recognition which should be afforded the minority have been stated at the beginning of this report. Upon consideration of these views and of the entire record of the proceeding, it is our opinion and we find that the plan should be modified to provide that a voting trust be created to continue for a period of 5 years from the date of consummation of the plan into which should be deposited all the new common capital stock of the reorganized company. The voting trustees should be three in number, all to be approved by the court, two to be designated by the St. Joe Paper Company or any successor thereof and one by the court to represent the minority interests, the latter trustee to have the power of election of one-third of the total number of directors of the reorganized company, or if the total is not evenly divisible by three, then the number of directors nearest to one-third of the total number. Any successor to the trustee designated by the court to fill a vacancy occurring subsequent to the termination of the jurisdiction of the court in the present proceedings should be designated by a judge of the United States District Court for the Southern District of Florida and any successor to the voting trustees designated by the St. Joe Paper Company should be designated by that company or its successor in interest. The directors elected by the voting trustee appointed by the court should have the right of appointment of one member of any finance and executive committee of the board of directors, which may be created by the board.

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[6] The duPont estate now controls another steam railroad located in Florida. The record shows that it intends to apply for our approval, under section 5 of the Interstate Commerce Act prior to consumation of this plan, of its acquisition of control of the reorganized company, and to divest itself of control of the other railroad property if such approval is not granted.

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The voting trustees should have power, upon the affirmative vote of a majority in number of shares of owners of common stock of the reorganized company represented by voting-trust certificates outstanding at the time, to sell all or any part of the trusteed stock and in connection with any such sale, to reclassify or alter the trusteed stock on such terms as they may determine.

The sale of the stock may be made at any time within the life of the trust for such consideration as the trustees deem expedient (as a part of which consideration they may take into account any agreements which the purchaser or purchasers may make by way of traffic agreements, guaranties, offers of exchange of securities or otherwise, which in the judgment of the trustees will be of value to the reorganized company or its creditors or stockholders).

For the purpose of determining whether a majority in number of shares of owners of the trusteed stock has consented the trustees may disregard trust certificates as to which, at the time of voting, the trustees know or have information affording a reasonable basis for believing that such trust certificates are owned or controlled by a railroad or by two or more railroads acting jointly.

The terms of any such sale and of the alteration or reclassification of the common stock of the reorganized company as aforesaid should be subject to our approval.

In the event of a sale of stock by the voting trustees as aforesaid, the proceeds of and the balance of the trusteed stock or reclassified stock allocable thereto pursuant to the terms of the sale approved in the manner above provided should be distributed pro rata to the holders of trust certificates against surrender of the certificates.

In the event that the sale of trusteed stock as above provided should be effected within the life of the voting trust, such trust should then be terminated and the remaining trusteed stock of each class should then be distributed pro rata to the holders of trust certificates against the surrender thereof.

Except as above provided, the trustees should have full voting power with respect to all stock in the trust and any dividends received upon trusteed stock should be distributed to the holders of trust certificates as of the record date of such dividends.

The reasonable fees and expenses of the trustees, including counsel fees, should be paid by the reorganized company.

There should be three reorganization managers, all to be approved by the court, one to be designated by the St. Joe Paper Company, one by the court, and the third also by the court (or in such manner as the court may determine) to represent the minority holders of the debtor's first and refunding bonds. We approve the other provisions with

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respect to the reorganization managers as stated in the plan formerly approved by us.

We have given due consideration to the requests by several of the parties that we alter the provisions of the plan in respect of the terms of office of directors and the number of directors. These matters are discussed in the reports of April 6, 1942, and August 10, 1942, and we see no reason for changing the decisions reached therein.

Petition of S. A. Lynch et al. to reopen the proceeding.—The further hearings in this proceeding upon reference back to us by the court of the plan approved in 1942 were closed on May 3, 1944, and, upon the filing of briefs, the case was submitted on July 20, 1944. On November 8, 1944, S. A. Lynch, S. A. Lynch Corporation, and Joseph van B. Wittmann, owners of substantial amounts of the debtor's first and refunding mortgage bonds filed a petition requesting that we reopen the proceeding for the purpose of permitting the petitioners to file a plan of reorganization as in the petition outlined, to assign the proceedings for further public hearing and to grant any other appropriate relief. An answer requesting denial of the petition was filed by St. Joe Paper Company, owner of a majority in principal amount of the debtor's first and refunding mortgage bonds. The plan of reorganization outlined in the Lynch petition resulted from negotiations between the petitioners and Atlantic Coast Line Railroad Company, hereinafter referred to as the Coast Line, and would have the effect of transferring to the latter company control of the debtor's railroad upon consummation of the plan.

The Coast Line thereupon filed a petition for leave to intervene in the proceedings and to file a brief in support of the Lynch petition. The Coast Line petition was granted by order of division 4, entered November 30, 1944, and all parties to the proceedings were given leave to file briefs on or before December 8, 1944. Briefs in support of the Lynch petition were received from the petitioners, the Coast Line and Frank D. Newman and in opposition from the St. Joe Paper Company and Fred G. Hamilton.

The independent protective committee for holders of the debtor's first-mortgage bonds also filed a brief in which no position is taken on the question of reopening raised by the Lynch petition, but our attention is called to the fact that delay in paying off the first mortgage in cash has already resulted in loss to the debtor of the difference between the relatively small amount of interest received on $12,000,000 of cash on hand and the annual interest charges of $540 000 being paid by the debtor each year on its first-mortgage bonds. The committee points out that further delay in the proceedings will result in continuing loss to the debtor and therefore urges that the debtor's trustees be authorized forthwith and directed to pay off the first mortgage in cash,

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together with accrued interest to date of such payment. Whether these bonds should be retired by payment or otherwise in connection with the administration of the debtor's estate appears to be a matter of the court's discretion.

Hamilton objects to the filing of a new plan and reiterates his contention that the lien dispute in respect of the two mortgages of the debtor must be decided, and that thereafter available cash should be distributed based upon the earning power since May 12, 1932, of the properties subject to the mortgages.

The plan proposed in the Lynch petition contemplates a purchase by the Coast Line from the old first and refunding bondholders at $100 per share of 60 percent, or $3,600,000, of an entire amount of $6,000,000, par value, of common stock to be issued in the reorganization of the debtor. The Coast Line thereby would obtain control of the debtor's railroad, since holders of a proposed issue of $15,000,000 par value of preferred stock, provided for in the Lynch plan, would, by the terms of the plan, be entitled to elect only one-third of the members of the new board of directors of the reorganized debtor and be entitled to only one-third representation on its executive and finance committees.

In addition to its cash payment of $3,600,000 and as additional consideration for obtaining control of the debtor's railroad, the Coast Line would guarantee payment of the interest on, but not the principal of $16,000,000 principal amount (the entire issue in the reorganization under the Lynch plan), of new first-mortgage 4-percent fixed-interest bonds, and would also guarantee annual sinking-fund payments of one-half of 1 percent of the principal amount of the bonds. The limit of the annual obligation of the Coast Line under its guaranties thereby would be $640,000 plus $80,000, a total of $720,000. The Coast Line would also agree to enter into a satisfactory agreement with the reorganized debtor concerning rate divisions and accounting.

The total capitalization and annual requirements before dividends on common stock under this plan, exclusive of equipment obligations (to be assumed) and capital fund, would be as follows:

	Capitalization	Annual requirements
Fixed-interest obligations:		
First-mortgage 4-percent bonds	$16,000,000	$640,000
Sinking fund		80,000
Total	16,000,000	[1] 720,000
4½-percent cumulative (up to a maximum of 13½-percent) preferred stock	15,000,000	675,000
Total debt and preferred stock	31,000,000	1,395,000
Common stock	[2] 6,000,000	
Total	37,000,000	1,395,000

[1] To be guaranteed by the Coast Line.
[2] $3,600,000 to be purchased by the Coast Line at par.

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The capitalization proposed in the Lynch petition as set out above is approximately that approved in our previous report. Exclusive of equipment obligations and capital fund, this compares with a total capitalization of $40,500,000, and annual requirements prior to common stock dividends of $1,012,500 (none consisting of fixed interest) under the plan approved above in this report.

Under both the Lynch plan and the plan herein approved, the existing first mortgage on the debtor's properties would be paid off in cash, together with accrued interest to the date of such payment, and all securities issuable in the reorganization would be distributed pro rata to the present first and refunding mortgage bondholders of the debtor, who, however, under the Lynch plan, would, as above stated, be required simultaneously to sell to the Coast Line at par $3,600,000 of the total of $6,000,000, par value, of common stock receivable by them in the reorganization.

The Lynch plan further provides for a distribution to the first and refunding mortgage bondholders out of cash in the hands of the debtor's trustees of not to exceed $6,000,000, such cash distribution to be so limited, however, that the reorganized debtor will have not less than $3,000,000 of cash remaining after the distribution and after payment or provision for payment of (1) the cost of constructing the Fort Pierce cut-off, (2) any additional income-tax liability in the event of a final adjudication that the debtor's trustees are not entitled to deduct interest on interest in arrears on the first and refunding bonds, and (3) reorganization expenses.

The petitioners and the Coast Line contend that the proposed plan is financially sound and greatly to the advantage of the first and refunding bondholders and of the public. They urge that we reopen the hearing in order that they may present factual support for these contentions and they express the opinion that the "interruption of immediate progress (in the proceeding) * * * might well eventuate in very substantial saving of time in the final consummation of reorganization."

They contend that the public interest will be served by operation of the debtor's railroad as part of an existing major railroad system. Such operation, they urge, will secure to the debtor traffic which is essential to it and which is highly competitive owing to the fact that its railroad parallels the coastwise steamship lines along the Florida coast, and since intense competition also results from the highway development along the coast. The Coast Line contends that it is particularly appropriate that it operate the debtor's railroad, since for many years it has been engaged in identically the same kind of transportation, is familiar with its every phase, and at present interchanges with the debtor a very large amount of freight and passenger

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traffic. Common operation, it urges, would represent a logical extension of the Coast Line's railroad into the Florida east coast territory would result in more efficient and economical service, and provide competition between two or more important trunk-line systems in the Southeast, while the effect upon the public interest of operation of the debtor's railroad by the St. Joe Paper Company is problematical.

The St. Joe Paper Company objects to a reopening of the proceeding on the grounds that the plan was not presented within the time required by the statute, that no satisfactory reason has been given to justify its consideration at this time, that if we consider that we have the power to reopen the proceeding in order to receive the new plan, other bondholders should likewise be permitted to propose other plans and other railroads to bid for the debtor's property, and that the result would be that the statutory provisions would be entirely disregarded and "there would be no end to this or any reorganization proceeding for the jockeying for position or the proposing of plans."

It contends that a granting of the petition would broaden the issues since the debtor's railroad is the only independent outlet for other carriers from the north, east, and west for Florida traffic and that other important railroads, such as the Southern Railway Company and the Illinois Central Railroad Company, would find the sole independent carrier to the south shut off from them and that these and possibly other carriers might seek to intervene in the proceeding for the purpose of showing that operation of the debtor's railroad by the Coast Line would not be consistent with the public interest. The St. Joe Paper Company also alleges that the petitioners do not own 10 percent of the total amount of the securities of the class of creditors to which they belong, and therefore are not entitled under the statute to file a plan, at least without our consent.

Section 77 (d) permits a plan to be filed with our consent at any time during the hearings. If we were convinced that the proceeding should be reopened and a further hearing held, we are satisfied that we would have the discretionary right under the statute to permit the filing of the new plan during such further hearing.

Aside from its procedural objections, the St. Joe Paper Company raises questions which merit careful consideration of the plan proposed in the petition. We have hereinbefore stated our conclusion as to a proper corporate structure for the reorganized company and have given the reasons for our finding that no fixed-interest securities other than equipment obligations should be issued in the reorganization. The petitioners Lynch and van B. Wittmann by joint brief filed prior to the filing of this petition suggested our adoption of a plan providing for no fixed-interest obligations and based on a cor-

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porate structure identical (except for the amount of capitalization) with that which we herein have approved viz, one-half first-mortgage income bonds and one-half common stock.

We are not convinced that the guaranties by the Coast Line of interest on the fixed-interest bonds now proposed and payments into the sinking fund warrant any change in our finding that no fixed-interest bonds should be issued in the reorganization. In its brief the St. Joe Paper Company refers to the net income realized by the Coast Line after payment of fixed charges, for the years 1932–39, inclusive. Its statement and the reports filed by that company with us, show that in 5 of the 8 years, namely, 1932, 1933, 1934, 1935, and 1938, deficits were incurred. The Paper Company argues that this indicates that in depression years the Coast Line guaranties would be worthless and in other years unnecessary. It is sufficient to state that the proposed fixed charges for the debtor exceed those which we herein find to be proper, and would under the proposal result in an unwise increase in the fixed charges of the Coast Line. In our opinion, the guaranties by the Coast Line might, during a depression of any considerable duration, contribute towards precipitating bankruptcy proceedings for both carriers even taking into consideration the possibility that certain economies might result from a common operation of the two lines. While we have expressed a conviction that consolidations of railroads under certain conditions are desirable in the public interest, the effect should be of reducing rather than increasing the fixed charges of the carriers involved.

In a preceding section of this report we have analyzed the cash requirements of the reorganized company for improvements and for other purposes upon consummation of its reorganization and we found that not less than $8,700,000 of cash should be reserved to be used for the purposes which we specified. These uses of cash include but are not confined to the three enumerated in the Lynch petition, for which cash of only about $2,330,000 would be required. It is our opinion that the petitioners', plan proposes an improvident dissipation of the cash now in the debtor's treasury by providing for a distribution of not exceeding $6,000,000 to the first and refunding bondholders, provided only that sufficient cash be retained to pay for construction of the Fort Pierce cut-off, possible future income-tax liability and reorganization expenses, plus an additional amount of $3,000,000.

The proponents of the Lynch plan contend that the sale at a price of $100 per share of 60 percent of the common stock allotted to the first and refunding bondholders would represent the full value of the stock based on the total capitalization provided for in the plan,

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and that the owners of the stock therefore would receive full compensation for the surrender of their shares and would have no legal right to complain. We are not convinced by this argument. All the securities to be issued under the plan taken at par will fall far short of satisfying the amount of the claim of the first and refunding bondholders. If, in the view of such bondholders, the prospects of future earnings or the control value are such that the stock later may have a market value in excess of par, and they desire to hold the stock to realize the higher price, they should be at liberty to do so, as they would not be reimbursed in full on their claim by accepting $100 per share for stock representing a part of their share of the debtor's estate. It is true that in the plan approved by us in *Minneapolis, St. P. & S. S. M. Ry. Co. Reorganization*, 252 I. C. C. 525 and 615, the new stockholders in that case were required to extend an option to the Canadian Pacific Railway Company of purchase of a part of their stock at a price established in the plan. In that case, however, the Canadian Pacific had controlled that debtor for a great number of years, was itself a large creditor of the debtor and there was general agreement among the creditors upon the necessity for the sale and the price to be paid for the stock. The parties to the proceeding in that case were generally agreed that a continued control by the Canadian Pacific of the debtor was vital to its existence and we so found.

No similar situation is presented in the present proceeding. The sale of stock would be required in the face of aggressive opposition from the holder of a majority in principal amount of the first and refunding bonds, which also states in its brief that, in the event the plan is approved, it will vote to reject it. It appears from its brief that the proposed sale was negotiated by petitioners without participation in, or knowledge of, the negotiations by the Paper Company. As pointed out by the St. Joe Paper Company, there is a distinction between the power of the court to order a judicial sale of the property of the debtor for the benefit of creditors as authorized by the statute, and the power "to sell the interests of one or all the creditors to another creditor or to an outsider for the benefit of the purchaser * * *"

We have made provision in the plan which we approve in this report for a voting trust under the terms of which it will be possible for the voting trustees, upon consent of a majority of the new stockholders, to sell all or a part of the new stock and in connection therewith to reclassify or alter the stock. For these several foregoing reasons we consider that the plan is prima facie impracticable and the petition is denied. In so ruling we do not express an opinion as to whether a future control of the debtor's railroad by the Coast Line or some other

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railroad company may or not be in the public interest and otherwise desirable.

CONCLUSION

We conclude that, upon the record previously made, and the record upon further hearing held by us, the report and order of April 6, 1942, *supra*, as modified by the report and order of August 10, 1942, *supra*, approving a plan of reorganization for the Florida East Coast Railway Company, debtor, pursuant to section 77 of the Bankruptcy Act, as amended, should be further modified as herein specified, and that, as thus modified, the plan will meet the requirements of section 77 (b) and (e) of that act, will be compatible with the public interest and should be approved.

Annexed hereto and made a part hereof is an appendix showing the treatment accorded claimants under the plan as modified herein, including the distribution of the new securities, and the capitalization and annual requirements of the reorganized company.

The petitions filed by all parties, except insofar as granted herein, will be denied.

An appropriate order will be entered.

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APPENDIX

Florida East Coast Railway Company Reorganization—Distribution of new securities

Nature of claim	Class	Principal	Interest to Jan. 1, 1946	Total claim	Cash	Assumed	First-mortgage 4½-percent income bonds	No-par common stock (at $100 per share)	Total new and assumed
Equipment trust I	II	$496,000		$496,000		$496,000			$496,000
Equipment trust J	II	170,000		170,000		170,000			170,000
Other equipment obligations		(1)		(1)		(1)			(1)
First-mortgage, 4¼-percent, 1959	III	12,000,000		12,000,000	$12,000,000				
First and refunding 5-percent, 1974	IV	45,000,000	$30,000,000	75,000,000			$20,250,000	$20,250,000	40,500,000
Priority claims	I			(2)	(2)				
General creditors	V								
Common stock	VI	37,500,000		37,500,000	None	None	None	None	None
					None	None	None	None	None
Total		95,166,000	30,000,000	125,166,000	12,000,000	666,000	20,250,000	20,250,000	41,166,000

[1] The equipment obligations, if any, issued to acquire new equipment to the extent outstanding when the plan is consummated will be assumed.
[2] To the extent allowed by the court and unpaid on date of consummation to be paid in cash.

Holders of the debtor's first and refunding mortgage bonds will receive for each $1,000 bond and unpaid interest thereon to January 1, 1946, $450 principal amount of new first-mortgage series A 4¼-percent income bonds and 4.5 shares of new no-par common stock.

Capitalization and annual requirements

	Capitalization	Fixed requirements	Contingent requirements
Equipment obligations	[1] $666,000	[1] $19,555	
First-mortgage bonds	20,250,000		
Capital fund			[2] $911,250
Sinking fund			[3] 360,000
			[3] 101,250
Total debt	20,916,000	19,555	1,272,500
Common stock	20,250,000		
Total	[1] 41,166,000	[1] 19,555	1,272,500

[1] Plus the unpaid portion of equipment obligations and interest thereon issued in acquisition of new equipment.
[2] Estimated at 2 percent of total railway operating revenues of $13,000,000.
[3] 0.50 percent of bonds issued on consummation of plan.

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F-8747

INTERSTATE COMMERCE COMMISSION

FINANCE DOCKET NO. 13170

FLORIDA EAST COAST RAILWAY COMPANY REORGANIZATION

Submitted October 10, 1946. Decided April 8, 1947

Upon petitions filed, further hearing, exceptions filed to a proposed report of the examiner and oral argument thereon, the plan of reorganization for the Florida East Coast Railway Company pursuant to section 77 of the Bankruptcy Act, as amended, further modified.[1]

Appearances as in prior reports and also the following:

United States Senators Claude Pepper and *Charles O. Andrews* and *United States Representatives J. Hardin Peterson* and *Joe Hendricks*.

Edward W. Bourne, *Andrew Oliver*, *G. L. Reeves*, *Howard P. Macfarlane*, *Leroy B. Giles*, *J. R. Bussey*, *James C. Knight*, *James A. Dixon*, *Drew L. Carraway*, *Fred N. Oliver*, *Willard P. Scott*, *Joseph W. Keena*, *S. R. Prince*, *Charles Clark*, *R. Granville Curry*, *Frederick M. Dolan*, *F. C. Hillyer*, *T. C. Maurer*, *Frank L. Mulholland*, *T. H. Hutchinson*, *Frank D. Upchurch*, *D. C. Smith*, *J. U. Gillespie*, *G. R. Nottingham*, *Francis T. P. Plimpton*, *Luther E. Birdzell, Jr.*, *M. L. Stephens*, *Miller Walton*, *W. R. C. Cocke*, *Harold J. Gallagher*, *Walter H. Brown, Jr.*, *Lorenzo C. Dilks*, *Oscar M. Ruebhausen*, *Clarence M. Mulholland*, *Willard H. McEwen*, and *Wallace Sample*, for interveners.

THIRD SUPPLEMENTAL REPORT OF THE COMMISSION

BY THE COMMISSION:

Exceptions to the report proposed by the examiner were filed and the case was argued orally. Our conclusions differ from those of the examiner.

Within the statutory period of 60 days from the date of our second supplemental report and order of January 8, 1945, 261 I. C. C. 151, further modifying and approving a plan for the reorganization of the Florida East Coast Railway Company, debtor, pursuant to the provisions of section 77 of the Bankruptcy Act, 11 U. S. Code Sec. 205, petitions for its modification were filed by the St. Joe Paper Company (controlled by the Alfred I. du Pont estate), the deposit committee for the debtor's first and refunding bonds (hereinafter called the 5-percent committee), S. A. Lynch, the Safe Deposit and Trust Company of

[1] Previous reports: 252 I. C. C. 423 and 731, 254 I. C. C. 865, and 261 I. C. C. 151.

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Baltimore, Frank B. Newman, and Lorenzo C. Dilks. In most of the petitions, requests for further hearing were made.

Parties intervening in this proceeding since the issuance of our report and order of January 8, 1945, are Lorenzo C. Dilks, Railway Labor Executives' Association, Southern Railway Company and subsidiaries (known as Southern Railway system), St. Johns County, Fla., St. Lucie County, Fla., city of New Smyrna Beach, Fla., Alleghany Corporation, city of Fort Pierce, Fla., Miami Chamber of Commerce, Brotherhood of Railroad Trainmen, Jacksonville Chamber of Commerce and Jacksonville Traffic Bureau, and Seaboard Air Line Railroad Company.

By the terms of subsection (d) of section 77 of the act, we may, after rendering a report and order in which we have approved a plan of reorganization, upon petition for good cause shown, filed within 60 days of the date of its order, and upon further hearing if we shall deem it necessary, modify in a supplemental report and order any plan which we have approved, stating the reasons for such modifications.

We heard oral argument on the matter of reopening the proceedings for the receipt of further evidence. Various parties urged the reopening for the purpose of supplementing the record upon the question of whether, under a plan of reorganization to be approved by us, control of the reorganized debtor should vest in the St. Joe Paper Company, hereinafter called the St. Joe Company, or in the Atlantic Coast Line Railroad Company, hereinafter referred to as the Coast Line, or whether the debtor's properties should be subject to some other control.

By order entered July 20, 1945, we directed that the proceeding be reopened and assigned for public hearing, for the purpose of receiving any relevant and material evidence by any party in interest relating to further modification of the modified plan approved by our second supplemental report and order of January 8, 1945, and for the proposal of other plans.

Hearings were held at Washington, D. C., on November 6–9, 1945, and at West Palm Beach, Fla., during the period November 13–30, 1945. At the commencement of the hearings a new plan of reorganization was filed by the Coast Line which differed materially from, and superseded the plan previously filed by S. A. Lynch, and others, which we rejected in our second supplemental report. Under the terms of the Lynch plan the Coast Line would have obtained control of the reorganized debtor through ownership of a majority of its voting stock. Under the terms of the new Coast Line plan, the properties of the debtor would be merged into the Coast Line, and the creditors of

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the debtor would receive cash and Coast Line securities in satisfaction of their claims. No other plan was presented for consideration, but evidence with respect to other requested modifications of the plan, including modifications of the new capital structure, was introduced by some of the parties. The greater part of the evidence at the reopened hearings related, however, to the question of future control of the reorganized debtor. Under the plan previously approved,[2] control would vest in the St. Joe Company by reason of its ownership of a majority in amount of the debtor's outstanding first and refunding mortgage bonds, the only securities of the debtor exchangeable under the plan for the new securities of the reorganized debtor. Briefs were filed, and a proposed report of an examiner was issued. Exceptions to this proposed report were filed and oral argument was heard by us.

COAST LINE PLAN

Description of plan.—Under the terms of the Coast Line plan, all the properties and assets of the debtor would be transferred to the Coast Line. The existing $12,000,000 first mortgage of the debtor would be paid in cash out of funds on hand in the debtor's treasury, and holders of the debtor's first and refunding mortgage 5-percent bonds, outstanding in the principal amount of $45,000,000 and upon which $30,000,000 of matured interest was in arrears as of December 31, 1945, would receive cash and Coast Line securities in the principal amounts and with annual interest and dividend requirements as shown in the following table:[3]

The divisional first-mortgage and income bonds would be obligations of the Coast Line, with the interest payable out of the income of the Coast Line, the principal, however, being secured only by the property of the debtor. Both mortgages would be closed mortgages.

[2] 261 I. C. C. 151.

[3] For the purpose of comparison the following table shows the capital structure provided for in the modified plan approved by our report of January 8, 1945, *supra*:

Cash disbursement—To be determined by the court

	Capital structure per $1,000 first and refunding mortgage bond [a]	Total	Annual requirements on total [b]
First-mortgage 75-year 4¼-percent income bonds	$450.00	$20,250,000	$911,250 contingent interest.
Common stock, no par value 202,500 shares stated at $100 per share	450.00	20,250,000	$101,250 contingent sinking fund.
Total	900.00	40,500,000	$1,012,500.

[a] Omits equipment-trust obligations.

[b] Omits capital-fund payments, none being provided for in the Coast Line plan.

All the new securities to be issued in the reorganization under the plan approved by us would be securities of the reorganized debtor.

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The Coast Line plan contains a provision that as a condition of its approval of the conveyance of the debtor's properties to the Coast Line, the Commission shall require a fair and equitable arrangement to protect the interests of the railroad employees affected.[4]

The plan also contains a provision that the existing through routes via Jacksonville to and from points now served by the debtor in connection with Seaboard Air Line Railroad Company, hereinafter referred to as the Seaboard, and Southern Railway system shall be kept open.

In an introductory statement to the plan, it is stated that should the Commission be of the opinion that any modification of the plan or any other plan providing for unification of the debtor and the Coast Line should be approved, the Coast Line will be prepared to give immediate consideration to any such modification or other plan.

Footnote 3—Continued

Cash disbursement per $1,000 first and refunding bonds, • $133.33. Total disbursement, • $8,000,000

	Capital structure per $1,000 first and refunding mortgage bonds [4]	Total	Annual requirement on total
Coast Line divisional first-mortgage fixed-interest 3½-percent bonds, due 1971	• $300.00	• $9,000,000	/' $315,000 fixed interest. /' $45,000 fixed sinking fund.
Coast Line divisional income 4¼-percent bonds, due 2021	• 250.00	• 11,250,000	/' $478,125 contingent interest. /' $56,250 contingent sinking fund.
Coast Line $4 preferred stock (non-voting new issue, $100 par value)	200.00	9,000,000	$360,000
Coast Line common stock (present stock, at $100 per share)	133.33	6,000,000	----------
Total of securities and annual requirements	783.33	35,250,000	/' $1,254,375

• At the hearings an alternative offer was made of $66.67 cash per bond ($3,000,000 total) plus all "free cash" in debtor's treasury.

[4] Omits the debtor's equipment obligations which are to be assumed by the Coast Line.

• An alternative offer is made of $450 of divisional income first-mortgage bonds ($20,250,000 total) in lieu of part fixed-interest first-mortgage and part income second-mortgage divisional bonds as above shown.

/' These amounts would be proportionally changed if the alternative provisions referred to in footnote • became effective.

[4] This covenant was supplemented of record by a statement of counsel for the Coast Line as follows: "If and when the Florida East Coast Railway property is operated as a part of Atlantic Coast Line, it will be the purpose of the Atlantic Coast Line to retain the officers and all others employed by the Trustees at the time of change in operation of the property. Thus none of the officers or employes would personally be adversely affected as to employment by the operation of the property by the Atlantic Coast Line," and by the following further commitment: "Both the Florida East Coast Railway Company and the Atlantic Coast Line Railroad Company are parties to the so-called Washington Job Protection Agreement. If these proceedings result in unification of the Florida East Coast Railway Company and the Atlantic Coast Line Railroad Company by merger, consolidation or conveyance of the property of the former to the latter, then and in that event it is the desire of the latter carrier that the provisions of said Agreement be applied for the protection of all employees who may be adversely affected as a result of these proceedings; said Agreement is accepted as a fair and equitable arrangement for the protection of all employees, and the final order of the Interstate Commerce Commission may so provide."

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OBJECTIONS OF ST. JOE COMPANY TO THE FILING OF THE COAST LINE PLAN AND TO ITS VALIDITY AS A PLAN PROPER TO BE FILED UNDER SECTION 77

The St. Joe Company contends that the Coast Line is not a party qualified under section 77 to file a plan of reorganization.

Subsection (d) provides that a plan shall be filed by the debtor and that "plans may likewise be filed at any time before, or with the consent of the Commission during the hearings * * * by the trustee or trustees or by or on behalf of the creditors, being not less than 10 per centum in amount of any class of creditors * * * or with the consent of the Commission by any party in interest."

The Coast Line was granted leave to intervene in this proceeding by our order entered November 30, 1944. At that time, there was pending before us the petition filed by S. A. Lynch, and others, for a reopening of the proceeding to allow petitioners to file a plan of reorganization, which contemplated a transfer of control of the debtor's properties to the Coast Line. After the proceedings were ordered reopened, over the objections of the St. Joe Company, the Coast Line presented its own plan, by which, as already described, it would obtain control of the debtor's properties by merger or consolidation. This plan was filed by the Coast Line at the reopened hearings in November 1945.

On October 18, 1945, shortly prior to the date upon which the Coast Line presented its plan, and about 3 weeks prior to the commencement of the reopened hearings, the Coast Line procured assignment to it of two claims on open account against the debtor, totaling $1,900,000, these claims being previously filed by Florida Coast Car Ferry Company and by the trustees under the will of Mary Flagler Bingham.

In our report of January 8, 1945, we had affirmed the previous finding in our report of April 6, 1942, that the assets of the debtor not subject to the liens of its mortgages are of such small amount in comparison with the amount of general unsecured claims, that any allotment of new common stock to the unsecured creditors would be so insignificant in amount as to present insurmountable difficulties in its distribution. Therefore, we found that such claims are without value. Until the proceeding was reopened in 1945, no unsecured creditor (with the exception of one party who did not appear except to file a brief) had contested this finding. Neither of the two assignors of the claims held by the Coast Line made representations in this proceeding or filed objections to the finding.

The Coast Line now contends that this finding is in error and claims that the unpledged assets of the debtor are sufficient to warrant a cash

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payment of about 2.75 percent of the principal amount of the unsecured claims. This contention will be discussed later in this report.

The record of this proceeding was reopened principally to receive evidence with respect to any new plans which might be filed, and more particularly a plan providing for control of the debtor by the Coast Line. The approval of a plan providing for such control was urged upon us at the oral argument upon the ground that it is required in the public interest. In order properly to develop evidence on this issue, participation in the reopened hearings by the Coast Line as a party to the proceeding was desirable if not essential.

It will be noted that subsection (d) of section 77 provides that, with our consent, a plan may be filed during the hearings by "any party in interest." In consideration of all the above facts, we find that the Coast Line is a party in interest entitled under the statute to file a plan.

The St. Joe Company further maintains that the plan itself contains nothing making it a binding commitment of the Coast Line nor has that company, so far as the record discloses, made any effort to obtain the approval by the Coast Line stockholders of the contemplated merger, as required by the Coast Line's articles of incorporation.[5] The St. Joe Company states that we, in effect, are requested to approve a plan the consummation of which dependens upon a vote of Coast Line stockholders not yet determined, and that such a plan does not comply with the requirements of section 77 that the plan provide the means for its execution.

It is true that there is no binding commitment, if any were possible at this time, by the Coast Line to adopt the plan which it filed or any other plan which we may approve. Refusal by the Coast Line to participate in a plan approved by us which requires the Coast Line's active participation would nullify the plan. The Coast Line plan, however, does not, for that reason, lack the adequate means for execution required by the statute. The plan is adequate in this respect, if under its provisions it can be consummated after it has been approved by us and adopted by the Coast Line. We therefore find that it is within our diseretion, in the light of all the special circumstances and necessities of this proceeding, to determine that ultimate adoption by the Coast Line of a plan approved by us requiring such adoption is not a matter

[5] The Coast Line on May 20, 1946, filed with us a petition for a limited reopening of the proceeding to receive in evidence as exhibits (1) a certified copy of a certificate for amendment of its charter, dated April 16, 1946, the effect of which would be to require the approval of only the holders of a majority of its stock to the proposed merger or consolidation of the debtor with the Coast Line or acquisition by the latter of the properties of the former and (2) a written opinion dated May 15, 1945, by R. B. Gwathmey, general attorney of the Coast Line, that the Coast Line's charter as so amended will have that effect. By our order entered June 27, 1946, these documents were received in evidence.

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of such uncertainty as to justify refusal to approve such a plan, even though otherwise it is found to be desirable and in conformity with the requirements of section 77.

With respect to the objections as to the sufficiency of the authorization by the Coast Line's board of directors and stockholders for the filing of the plan, we are of the opinion, and therefore find, that the alleged defects, if any exist, in the procedure adopted by the Coast Line in proposing and prosecuting its plan of reorganization in this proceeding can be cured by appropriate action before we proceed under subsection (f)* of section 77 to grant the authority necessary to put the plan into effect.

The St. Joe Company also takes the position that the Atlantic Coast Line Company, hereinafter referred to as the Coast Line Company, and the Safe Deposit and Trust Company of Baltimore, hereinafter referred to as the Safe Deposit Company, neither of which joined in the Coast Line plan, control the Coast Line (the Safe Deposit Company through control of the Coast Line Company) and therefore are indispensable parties to any plan for acquisition by the Coast Line of the debtor's properties. In *Atlantic Coast Line R. Co. Purchase*, 261 I. C. C. 820 (memorandum), we found that the Coast Line Company controlled the Coast Line and that it was a necessary party to that proceeding which was under the provisions of the Interstate Commerce Act. The record discloses no change in the situation since that decision. No finding of control was made with respect to the Safe Deposit Company, and that subject will be discussed hereinafter. In support of our finding that the Coast Line Company controls the Coast Line we cited *United States* v. *Marshall Transport Company*, 322 U. S. 31.

Section 77 of the Bankruptcy Act provides that a plan of reorganization shall not be inconsistent with the provisions and purposes of the Interstate Commerce Act, but does not specify that the same procedure must be followed. To insure conformity with the provisions of subsection (f) of section 77, the record of a reorganization proceeding involving the question of an acquisition of the properties of a debtor by another carrier or by a noncarrier company which already controls a carrier, (but, on the present record of this case only to the extent as hereinafter shown to be necessary), should be sufficient to enable us, in approving a plan, to make the findings required under

* Subsection (f) provides in part: "Upon confirmation of a plan the Commission shall, without further proceedings, grant authority for the issue of any securities, assumption of obligations, transfer of any property, sale, consolidation or merger of the debtor's property, or pooling of traffic, to the extent contemplated by the plan and not inconsistent with the provisions and purposes of the Interstate Commerce Act as now or hereafter amended."

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the Interstate Commerce Act with respect to such an acquisition. The Commission, division 4, by order entered October 14, 1940, specified the information to be supplied in support of consolidation, merger, or acquisition applications under section 5 (2) of the Interstate Commerce Act.

Representatives of both the Coast Line Company and the Safe Deposit Company appeared and testified at the hearings in November 1945 in this proceeding in support of the Coast Line plan. We find that the record is sufficient in all respects upon the issue of acquisition of the debtor's properties by the Coast Line to enable us to make the necessary findings.

As a part of our orders approving plans of reorganization under section 77, we invariably, as in the present case, insert the following provision:

It is further ordered, That nothing herein contained shall be, or be construed as, a grant of authority for the issue of any securities, assumption of obligations, transfer of any property, sale, consolidation, or merger of the debtor's properties, or pooling of traffic, pursuant to either the Bankruptcy Act or the Interstate Commerce Act, until further action by this Commission upon confirmation of the plan by the court.

If any procedure consistent with the requirements of the Interstate Commerce Act, later should be found to be required in this connection, the appropriate action can be taken in this proceeding before we grant the final authority specified in subsection (f) of section 77.

We find that the fact that the Coast Line Company and Safe Deposit Company did not join with the Coast Line in filing the Coast Line plan will not prevent approval of the plan.

POWER OF THE COMMISSION UNDER THE STATUTE TO APPROVE A PLAN TRANSFERRING THE DEBTOR'S PROPERTY TO THE COAST LINE

Subsection (b) of section 77 of the Bankruptcy Act provides among other things that a plan of reorganization—

shall include provisions modifying or altering the rights of creditors generally, or of any class of them, secured or unsecured, either through the issuance of new securities of any character or otherwise; may include provisions modifying or altering the rights of stockholders generally, or of any class of them, either through the issuance of new securities of any character, or otherwise; * * * shall provide adequate means for the execution of the plan; which may include the transfer of any interest in or control of all or any part of the property of the debtor to another corporation or corporations, the merger or consolidation of the debtor or with another corporation or corporations, the retention of all or any part of the property by the debtor, the sale of all or any part of the property of the debor either subject to or free from any lien at not less than a fair upset price, the distribution of all or any assets, or the proceeds derived from the sale thereof, among those having an interest therein. * * *

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Subsection (d) of section 77 contains a provision that a plan approved by us shall, in our opinion, be compatible with the public interest.

Subsection (e) provides in part that the court may approve a plan previously approved by us if satisfied that—

> It complies with the provisions of subsection (b) of this section, is fair and equitable, affords due recognition to the rights of each class of creditors and stockholders, does not discriminate unfairly in favor of any class of creditors or stockholders, and will conform to the requirements of the law of the land regarding the participation of the various classes of creditors and stockholders.

This subsection further provides that the judge shall confirm the plan upon receipt of certification by us of the results of voting on acceptance or rejection of the approved plan, if the judge is satisfied that it has been accepted by the requisite proportion of each class of creditors and stockholders voting on the plan. He may also confirm a plan which has not been so accepted—

> if he is satisfied and finds, after hearing, that it makes adequate provision for fair and equitable treatment for the interests or claims of those rejecting it; that such rejection is not reasonably justified in the light of the respective rights and interests of those rejecting it and all the relevant facts; and that the plan conforms to the requirements of clauses (1) to (3), inclusive, of the first paragraph of this subsection (e).

The St. Joe Company contends that, in the absence of full payment of the first and refunding bondholders' claim or of a public sale of the debtor's properties at an upset price fixed by us, these bondholders are entitled upon reorganization to possession of all the properties of the debtor including its cash on hand. It further asserts that any interpretation of the powers conferred upon us and the court by section 77 which would permit of a denial of this right to the bondholders over their objection[1] (and in the absence of an exercise of the right of eminent domain) would violate the fifth amendment of the Constitution. The St. Joe Company bases its argument fundamentally on the decision of the United States Supreme Court in *Louisville Joint Stock Land Bank* v. *Radford*, 295 U. S. 555.

The Coast Line, while acknowledging the principle that the property of a debtor must be devoted to satisfaction of creditors' claims, contends that section 77, providing means for discharge of claims against railroad debtors other than by public foreclosure sales, was enacted in recognition of the fact that such sales are costly, cumbersome, inadequate and impracticable. In support of its argument that

[1] The St. Joe Company owns 56 percent of outstanding first and refunding mortgage bonds, and asserts that holders of 75 percent have stated unequivocally that they would reject the Coast Line plan and would not agree to any merger of the debtor's property.

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a public sale of the debtor's property is not required even though creditors will not receive full satisfaction of the total amount of their claims, it cites a decision of the Supreme Court and two subsequent circuit court of appeals decisions[8] where creditors proceeding under section 75 of the Bankruptcy Act were denied foreclosure sales and the mortgagors were afforded opportunity to redeem the mortgaged properties for cash at appraised values fixed by the court. The Coast Line contends that the "equitable equivalent of the rights surrendered"[9] by the first and refunding bondholders in this proceeding may be represented by payment in securities as well as by cash if the securities offered are of a value found to be sufficient in "the informed judgment of the Commission and court based on consideration of all relevant facts."[9] The Coast Line insists that the paramount importance of the public interest justifies a denial to the first and refunding bondholders of ownership and control of the debtor's property.

The first and refunding bondholders will, upon satisfaction of the debtor's first mortgage in cash, constitute the only class of creditors having an interest in the reorganization, other than holders of equipment trusts and of certain claims having preference over the liens of the debtor's mortgages, and unless, contrary to our previous decisions in this proceeding, we and the court shall find that there are unpledged assets of the debtor of sufficient value to warrant a payment on unsecured claims as urged by the Coast Line and one other party.

Subsection (e) of section 77 quoted above in part, provides that the court may confirm a plan upon making the findings specified in that subsection, despite a nonacceptance of the plan by any class or classes of creditors. The decision of the U. S. Supreme Court in *Reconstruction Finance Corp.* v. *Denver & R. G. W. R. Co.*, 90 Law. Ed. 1134, 328 U. S. 495, fully confirms this right. The Coast Line contends that this decision establishes beyond doubt our power in this proceeding to authorize a transfer of the debtor's property to the Coast Line, upon payment to the debtor's bondholders of a consideration which we consider the fair and equitable equivalent of the value of the bondholders' claim, even in the face of opposition from a large majority of the bondholders. The problem, however, is in determining whether an assignment of the debtor's entire property to the Coast Line will be in conformity with the statutory provision that the plan make adequate provision for fair and equitable treatment of the claim of these bondholders.

[8] *Wright* v. *Union Central Life Ins. Co.*, 311 U. S. 273; *State of North Dakota* v. *Szarkowski*, 142 Fed. (2d) 333 (certiorari denied 323 U. S. 718), and *North Dakota* v. *Stanton*, 142 Fed. (2d) 860 (certiorari denied 323 U. S. 718).

[9] *Group of Institutional Investors* v. *Chicago, M., St. P. & P. R. Co.*, 318 U. S. 523, 565–566.

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We are of the opinion that the adoption of a plan of reorganization of the debtor providing for its merger or consolidation with the Coast Line under which securities and cash of the latter company in an amount reflecting our "informed judgment" of the value of the debtor's property would not contravene the priority rule expressed in *Northern Pac. R. Co.* v. *Boyd*, 228 U. S. 505.[10] "The rule of the Boyd case protects the rights of senior creditors against dilution either by junior creditors or by equity interests." *Group of Institutional Investors* v. *Chicago, M. St. P. & P. R. Co.* 318 U. S. 523, 569.

We interpret the priority rule of the *Boyd* case as meaning that the assets of an insolvent company must be applied first to the claims of the senior creditors, and that nothing must be paid to the stockholders or junior creditors so long as the claims of the senior creditors remain unsatisfied. The rule deals with the rights of the creditors and stockholders to the satisfaction of their claims.

The Coast Line entered the picture as a connecting trunk line, willing to operate the debtor as part of its system and to issue to the creditors securities of its own of the ascertained value of the claims surrendered by them. It has been admitted as a party to the proceedings by us pursuant to our authority and duty to promulgate a plan which is not only fair and equitable to the creditors but compatible with the public interest in the maintenance of an adequate transportation system. This is in full accord with the theory of the act. Under the statute we are charged with the dual duty of promulgating a plan which will be fair and equitable to the creditors and which will be compatible with the public interest. In our informed judgment, we must determine the value of the property, and this value, expressed in terms of securities or cash, is distributed to the creditors in the order of their priority. Claims in excess of such value, including the interest of the stockholders, are treated as worthless.

In *Reconstruction Finance Corporation* v. *Denver & R. G. W. R. Co.*, *supra*, the Court said:

> We see no more constitutional impediment to the elimination of claims against railroad debtors by the Interstate Commerce Commission's determination of values with judicial review as to the sufficiency of the evidence and compliance with statutory standards than we do to their elimination by an accepted bid in a depression market.

It is immaterial out of what assets the creditors are paid. *Ecker* v. *Western Pac. R. Corp.*, 318 U. S. 488. "It is sufficient that each security holder in the order of his priority receive that which is available for the satisfaction of his claim the equitable equivalent of the rights

[10] "Any arrangement of the parties by which the subordinate rights and interests of the stockholders are attempted to be secured at the expense of the prior rights of either class of creditors comes within judicial denunciation."

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surrendered." *Group of Institutional Investors* v. *Chicago, M., St. P. & P. R. Co., supra.*

The statute expressly provides that the plan "may include the transfer of interest in or control of all or any part of the property of the debtor to another corporation, or corporations, the merger or consolidation of the debtor with another corporation or corporations . . .," and the court may confirm despite the objection of the creditors. *Denver and Rio Grande* case, *supra.* The plan may also provide "for the issuance of securities of such other corporation, or corporations, for cash or in exchange for existing securities, or in satisfaction of claims or rights, or for other appropriate purposes."

The transfer of the control of the debtor corporation, or its merger with another corporation in return for securities of the latter corporation equal in value to the ascertained valuation of the debtor's property, would not violate the priority rule. To hold that it did would, in our opinion, virtually emasculate the broad provisions of the Bankruptcy Act which impose upon the Commission and the courts the power and duty, in the public interest, "to deal with the most important feature of all reorganization plans, that of control of the reorganized company," (*Ecker* v. *Western Pac. R. Co., supra.*) and would render them impotent to perform their functions under the act. The acquiring corporation is in a sense a purchaser for value. It pays in full for what it gets. Conceivably, if the consideration is inadequate, the creditors may complain that the plan is not fair and equitable. But it is obvious that this would not pose any question with respect to the priority rule. "Investors or speculators in junior security issues, by their entry into a railroad enterprise assumed the risk that in any depression or in any reorganization the interests of the public would be considered as well as theirs." *Denver & Rio Grande* case, *supra.*

The priority rule would be transgressed only where the security holder in the order of his priority fails to receive "from that which is available for the satisfaction of his claim the equitable equivalent of the rights surrendered." That does not occur here, for all of the securities to be issued by the Coast Line and all of the cash to be paid by the Coast Line will be delivered to the first and refunding bondholders, and the junior creditors and stockholders will receive nothing.

The Coast Line contends that we must recognize the fact, as we do, that control by this class of creditors will result in control by the St. Joe Company, and it alleges that the record proves that such control will not only be incompatible with the public interest but will also adversely affect the interests of the bondholders as a class and will not constitute a valuable right. This, in effect, means that, in the event

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we find the Coast Line assertion to be correct, we should protect the interests of such of the minority of the bondholders as do not desire St. Joe Company control and who do not wish an opportunity of recoupment of their loss from the future earnings of the debtor's property. The Coast Line is no part of this minority.

In any plan purporting to transfer control of the debtor to the Coast Line, a provision permitting a judicial sale of the mortgaged property such as permitted in *Alton R. Co. Reorganization*, 261 I. C. C. 343,[11] (in which unification of that debtor with the Gulf, Mobile & Ohio Railroad Company was approved) would defeat such a transfer, since the Coast Line obviously could not successfully compete in bidding with the debtor's first and refunding bondholders, a large majority of whom (in amount of bonds) desire to retain control.

In view of the provisions of subsection (b) of section 77, and the provision that the plan must be compatible with the public interest as well as afford due recognition to the rights of the creditors, we conclude that we have the power, in the face of the opposition of the holders of the bonds, to approve a plan transferring control of the debtor to the Coast Line. However, to justify this transfer, we must find, based on a convincing showing, that it is required by and is compatible with the public interest, and that the provisions under such a plan for the satisfaction of the claim of the first and refunding bondholders will afford the creditors a price in cash and Coast Line securities which will equal the value of all the properties of the debtor to be transferred to the Coast Line, taking into consideration such value to the creditors as may be inherent in their opportunity otherwise to operate the property themselves and to recoup their losses from such future operation.

PUBLIC INTEREST IN CONTROL

The Coast Line takes the position that there is no presumption that control by the St. Joe Company of the debtor will be in the public interest, that a convincing affirmative showing must be made by the St. Joe Company to that effect, that the same criteria as to the public interest should control our decision as in a proceeding under section 5 of the Interstate Commerce Act, and that the St. Joe Company, having acquired a majority of the debtor's first and refunding bonds for the avowed purpose of obtaining control of the debtor has the burden of proving that such control will be compatible with the public

[11] In this case we found that independent operation would not be financially advisable and stated at page 361: "All parties to the proceeding who have taken a position in the matter, at the hearing or on brief, including those who previously filed other plans, are now in agreement that we should approve, substantially as proposed the committee's plan contemplating unification of the Alton with the Gulf, Mobile & Ohio."

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interest. The Coast Line contends that the St. Joe Company has not fulfilled this latter obligation, especially by failing to make a full disclosure of all relevant information concerning its holdings and the conduct of its affairs.

There is no doubt that control of a reorganized debtor is a matter of the greatest public interest.[12] This proceeding was reopened at the request of the Coast Line and others and a voluminous record developed, principally to receive evidence of the facts and circumstances with respect to that interest, and more particularly to determine whether the debtor should be operated in the future under the control of the Coast Line or the Du Pont interests, or otherwise as an independent carrier not controlled by any truck line.

The proceeding before us was previously reopened for public hearing, which was held in May 1944, prior to the filing of the Lynch plan and therefore prior to the Coast Line's having indicated a desire to operate the properties of the debtor. On the basis of the record through the May 1944, hearing, control could have been given only to the first and refunding bondholders, and no representations had then been made that control by St. Joe Company, which by then had purchased a majority of those bonds, would not be compatible with the public interest, provided certain safeguards of minority interests were assured. It was only after the then record was closed and shortly prior to the issuance of our report and order of January 8, 1945, that preference for any other control was voiced by any of the parties to the proceeding and the question of the public interest actively injected.

The Coast Line plan, by which control would be transferred to that carrier, is in effect a request or application to us by one carrier for authority to acquire control of another and, in conformity with the provisions of subsection (f) of section 77 of the Bankruptcy Act that the transfer of the properties of a debtor be not inconsistent with the provisions and purposes of the Interstate Commerce Act, the record should contain the information required in a proceeding under section 5 (2) of the Interstate Commerce Act. In our report

[12] In *New York Central Securities Corp.* v. *United States*, 287 U. S. 12, 24–25, the Supreme Court stated that the term public interest "is not a concept without ascertainable criteria, but has direct relation to adequacy of transportation service, to its essential conditions of economy and efficiency, and to appropriate provision and best use of transportation facilities." And in *Ecker* v. *Western Pac. R. Corp.*, 318 U. S. 448, 468, the Court said: "These reorganizations require something more than contests between adversary interests to produce plans which are fair and in the public interest. When the public interest, as distinguished from private, bulks large in the problem, the solution is largely a function of the legislative and administrative agencies of government with their facilities and experience in investigating all aspects of the problem and appraising the general interest."

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in *Virginian Ry. Co. Control*, 117 I. C. C. 67, 85,[12] which was a proceeding under that section of the Interstate Commerce Act, we stated:

> Applications for authority to acquire control of railroads under the Interstate Commerce Act must be supported by a clear and strong showing of public gain. If serious doubt exists regarding the wisdom of the proposed grouping, that doubt must be resolved against the applications. Real and substantial advantages of railroad grouping are capable of reasonable proof. So are the disadvantages. There must be of record a substantial preponderance of evidence in favor of an application before we are warranted in giving it favorable consideration.

Section 5 (2) of the Interstate Commerce Act does not require our authorization of an acquisition of control by a "person which is not a carrier" of a carrier unless control of two or more carriers by such noncarrier applicant is involved. Under the procedural requirements of plans heretofore approved by us, and which we would include in any plan approved herein which might vest control of the debtor's property in the St. Joe Company, the St. Joe Company would not acquire such control until consummation of the plan and until after further action by us upon confirmation of the plan by the court. The St. Joe Company has stated that, if under the plan finally approved it is permitted to acquire control of the debtor, it will apply to us under the provisions of section 5 (2) of the Interstate Commerce Act for authority to control both the Apalachicola Northern Railroad Company, hereinafter referred to as the Apalachicola, which it now controls, and the debtor and, if such authority is not granted, that it will divest itself of control of the Apalachicola.

If this pledge by the St. Joe Company were not of record, the present record should contain all the information required in a section 5 (2) proceeding to enable us to determine whether the St. Joe Company should be permitted to control both the debtor and the Apalachicola, an issue, which, in view of the pledge, it is not necessary for us to decide at this time. It is unnecessary to now burden the present voluminous record with that additional evidence, since consummation of any plan approved by us having the effect of vesting control of the debtor in the St. Joe Company would not be affected by any decision which we might later make in the section 5 (2) proceeding, which would then be required.

However, under the provisions of section 77 of the Bankruptcy Act the approved plan must be compatible with the public interest, and the record should be fully sufficient to afford a basis for decision of that question. The record with respect to both aspirants for control of the debtor and regarding other matters affecting the public interest

[12] See also *Erie R. Co. and Pere Marquette Ry. Co. Control*, 138 I. C. C. 517, 530, 267 I. C. C.

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is unusually extensive in both amount and scope. But the Coast Line contends that it still lacks certain documents and data with respect to the holdings of the Du Pont estate, which the St. Joe Company refused to divulge and which are essential to a fair determination of the question of whether control of the debtor by the St. Joe Company will be compatible with the public interest. These allegedly vital deficiencies in the record will be discussed hereinafter.

Description of the Coast Line and its intercorporate relationships.—The Coast Line as of December 31, 1944, owned 4,697.49 miles of main line and branches, including its main double-track line from Richmond to Jacksonville, its main line (partly double-tracked) from Jacksonville to Tampa, and other lines (including branches) reaching points in Virginia, North Carolina, South Carolina, Georgia, Alabama, and Florida. It reaches Washington, D. C., from Richmond, Va., over the Richmond, Fredericksburg and Potomac Railroad Company (hereinafter referred to as the R. F. & P.), having a one-sixth interest in the Richmond-Washington Company, which controls the R. F. & P.

The Coast Line's affiliates as referred to in the record include the Fort Myers Southern Railroad Company, Tampa Southern Railroad Company, Virginia and Carolina Southern Railroad Company, Columbia, Newberry & Laurens Railroad Company, Winston-Salem Southbound Railway Company, and Charleston and Western Carolina Railway Company. The Winston-Salem Southbound Railway Company, extending from Winston-Salem, S. C., to Wadesboro, N. C., is owned jointly by the Coast Line and the Norfolk & Western Railway Company, and the Charleston & Western Railway Company extending from Spartanburg, S. C., to Port Royal, S. C., with branches to Anderson and Greenville, S. C., is owned by the Atlantic Coast Line Company, a Connecticut corporation, found by the Commission in *Atlantic Coast Line R. Co. Purchase*, *supra*, to hold control of the Coast Line within the meaning of the Interstate Commerce Act.

The Coast Line and the Louisville and Nashville Railroad Company, hereinafter referred to as the L. & N., jointly lease the Clinchfield Railroad Company, having lines extending from Elkhorn City, Ky., to Spartanburg, S. C., and the Georgia Railroad, having a main line from Augusta, Ga., to Atlanta, Ga., with a branch to Macon, Ga. The latter lease covers approximately 50 percent of the stock of the Atlanta and West Point Railroad Company and The Western Railway of Alabama whose lines extend from Atlanta, Ga., to Montgomery and Selma, Ala.

The Coast Line as of December 31, 1944, owned 596,700 shares of stock of the L. & N. This stock was deposited as collateral security with the trustee of the Coast Line's Louisville & Nashville collateral-

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trust 4-percent bond indenture, originally securing $35,000,000 bonds. During the year 1945, the L. & N. stock was divided, 2 new shares being issued for each old share making the Coast Line's ownership 1,193,400 shares. Subsequently, the Coast Line sold 369,973 of these new shares, the proceeds being used to retire its collateral-trust bonds, of which $20,000,000 remained outstanding at the time. The balance of the L. & N. stock retained by the Coast Line amounts to 823,427 shares or 35 percent of the total issue. The L. & N. controls the Nashville, Chattanooga & St. Louis Railway by stock ownership.

In general the lines of railroad owned, leased, or controlled by the Coast Line (including the L. & N. as a controlled line) or over which it has trackage rights, comprise about 11,000 miles and extend south along the Atlantic seaboard from Washington, D. C., through Richmond and Norfolk, Va., Wilmington, N. C., Charleston, S. C., and Savannah, Ga., into Florida and west to New Orleans, La., Birmingham, Ala., Atlanta, Ga., Nashville and Memphis, Tenn., Hickman, Ky., St. Louis, Mo., Louisville, Ky., Cincinnati, Ohio, Winston-Salem, N. C., and into the coal territory served by the Clinchfield Railroad Company.

The Coast Line operated 2,029.63 miles of railroad in the State of Florida in 1940 or 37.76 percent of the total of all railroads. Together with the L. & N. the total was 42.28 percent, which, combined with the debtor's mileage of 12.74 percent would constitute 55.02 percent. The mileage of the Seaboard was 31.33 percent of the State total. Similar percentages of total tons of freight carried in the State of Florida in the same year are by Coast Line 38.53 percent, L. & N. 5.25 percent, combined Coast Line and L. & N. 43.78 percent, debtor 7.7 percent, which, if added to the combined Coast Line and L. & N. tonnage, would produce 51.48 percent, and Seaboard 34.38 percent.

The lines of the Coast Line and L. & N. serve principally in Florida its central and northern sections and west coast, reaching south to St. Petersburg, Tampa, Naples, and Everglades.

In general, the Seaboard is competitive with the Coast Line throughout the southeastern territory of the United States including the State of Florida. In Florida the Seaboard competes with the debtor for traffic originating and delivered to points on the east coast from West Palm Beach to Homestead, south of Miami. The debtor and the Coast Line with their principal connection and traffic interchange at Jacksonville, Fla., are practically noncompetitive and have maintained a close traffic relationship in the past with respect to both freight and passenger traffic moving between the east coast of Florida and the north and west. Other connections and minor interchange points between the Coast Line and the debtor are at Palatka, Benson Junction, and Lake Harbor, all in Florida.

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The Coast Line extensively advertises and operates a through passenger service in connection with the debtor from the west and north to the east coast of Florida. The debtor's passenger interchange with other lines is comparatively negligible. The freight-traffic interchange between the Coast Line system and the debtor about equals the debtor's interchanges with all other railroads in the case of traffic originated on the debtor's line, and is somewhat in excess thereof in the case of traffic terminated on the debtor's line.

The Coast Line and the debtor jointly own The Pensinsular & Occidental Steamship Company operating freight and passenger service (except as discontinued because of World War II) between Miami, Fla., and Havana, Cuba, and between Port Tampa, Fla., and Havana, Cuba.

The Coast Line Company, a Connecticut corporation, created or utilized to assemble the present Coast Line railroad system owns 26.56 percent of the voting stock of the Coast Line and in *Atlantic Coast Line R. Co. Purchase*, *supra*, was found by us, as hereinbefore stated, to hold control of the Coast Line within the meaning of the Interstate Commerce Act. Its other investments include all the stock of the Charleston Western Carolina Railway Company, more than 50 percent of the stock of the South Carolina Pacific Railway Company (a part of the Coast Line system) and other stocks and bonds of railway companies mostly affiliated with the Coast Line system. Its total investment in "affiliates" is $21,874,224 of which bonds of the Coast Line in the amount of $3,905,265 are deposited with the Safe Deposit Company which as sole trustee, cotrustee, coexecutor, agent, and owner, holds 140,925 shares or 59.9 percent of the 235,200 shares of stock of the Coast Line Company. Additionally the Safe Deposit Company holds in similar capacities 62,028 or 7.51 percent of the stock of the Coast Line. The Safe Deposit Company administers the estates of Henry Walters and certain of his associates who were principally instrumental in building the Coast Line system through the medium of the Coast Line Company. Of the 12 directors of the Coast Line, 6 are directors of the Coast Line Company including the president of the latter, who is chairman of the board of both companies. Of those 6 directors, 2 are directors of the Safe Deposit Company.

The Safe Deposit Company formerly supported a plan proposed by the St. Joe Company. The chairman of the board of directors of the Safe Deposit Company, while not committing his company to further action, testified in support of the St. Joe Company plan at the hearing on the plan for the reorganization of the debtor held by us in May 1944. At that time the Safe Deposit Company held in trust about $2,000,000 principal amount of the debtor's first and refunding

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bonds, purchased before the receivership, and about $400,000 or $500,000 of the debtor's first-mortgage bonds. Subsequently, when the question of possible Coast Line control arose upon the petition filed by S. A. Lynch, and others, for a reopening of the proceeding, the Safe Deposit Company withdrew its support of the St. Joe Company plan and now supports the plan proposed by the Coast Line. The executive committee of the Safe Deposit Company's board of directors has approved this plan, and its president stated at the further hearing that the plan would be submitted to the board of directors for approval.

Description of the St. Joe Company and other Du Pont interests. The St. Joe Company owns about 56 percent of the $45,000,000 principal amount of the debtor's outstanding first and refunding mortgage bonds, which it acquired to that extent for the avowed purpose of obtaining control of the debtor's line of railroad upon its reorganization. The activities, holdings and relationship with the estate of Alfred I. du Pont of this company (and its predecessor in interest in this proceeding, the Florida National Building Corporation) have been heretofore generally described in former reports in this proceeding. At the reopened hearings in November 1945, the record in this respect was greatly amplified.

The trustees of the Du Pont estate for whom Edward Ball has been the spokesman and active negotiator, if not the dominating influence in this reorganization proceeding, are four in number. They comprise at present Ball, the Florida National Bank of Jacksonville, Jessie Ball du Pont, widow of Alfred I. du Pont and sister of Edward Ball, and a son-in-law of du Pont, Elbert Dent. Vacancies among the trustees are to be filled by the remaining trustees except that Dr. F. P. Gaines, president of Washington and Lee University, is specifically named to succeed Ball. The trustees must act by a majority unless majority decision is impossible, in which case the ruling of the corporate trustee is final.

There is no connection between the estate of Alfred I. du Pont and the well-known Du Pont interests of Wilmington, Del. The late Alfred I. du Pont was a member of the Wilmington, Del., family, but disassociated himself from the family interests, except for retaining his holdings of stock of E. I. du Pont de Nemours & Company, and moved to Florida to live. None of the trustees now managing the estate are members of the Du Pont family, except by marriage.

The investments and activities of the estate are large, varied and, except for the original basic investments in E. I. du Pont de Nemours & Company and General Motors Corporation, are mostly centered in the State of Florida. The income from the trust estate under the

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terms of Du Pont's will is subject to certain annuities and a life interest of Du Pont's widow, but otherwise is to be devoted to a charitable Delaware corporation to be created by the trustees and entitled "The Nemours Foundation." This foundation is for the purpose of maintaining the family estate in Delaware known as "Nemours" as an institution for the care and treatment of crippled children, not incurable, and the care of old men and women, first consideration to be given to residents of Delaware. Any surplus income may be used in contributions to other worthy charitable institutions established for the same purposes.

As of December 31, 1944, the inventory value of the trust assets was $49,948,142, of which $32,591,063 represented stock in the Du Pont and General Motors companies, $12,474,104 stock (76½ percent) of the St. Joe Company, $3,063,784 stocks of Florida banks, $6,252 bonds of the debtor, $144,189 other bonds, $209,060 other securities, $613,940 real estate, and $845,750 cash. One of the banks, the investment in which is included above, owns slightly more than one-half the stock of the Union Terminal Warehouse Company at Jacksonville, Fla., and another one owns a bank and office building at Miami, valued at $3,261,559.

A balance sheet as of December 31, 1944, of the St. Joe Company shows assets as follows: Current assets $13,648,695, including "investments at cost" $10,569,643, investments in affiliated companies $1,204,174, plant property, less depreciation, $5,207,841, other property less reserves for depreciation and depletion $5,797,345, other assets $12,366 and deferred charges $151,492, total of all assets, $26,021,913. Liabilities amounted to $18,107,107, capital surplus to $5,088,261 and earned surplus to $2,826,545. Based on present market quotations and values, the value of the assets of the St. Joe Company are greatly in excess of the above book values.

The paper mill owned by the company is located at Port St. Joe on the Gulf of Mexico in northwestern Florida south of Chattahoochee at which point the Apalachicola, which serves the St. Joe Paper Company plant and other industries, connects with the L. & N., Seaboard and Coast Line. All the securities of the Apalachicola are owned by the St. Joe Company. Other investments by the latter company include a large amount of land in west Florida, a telephone and telegraph company operating in and around St. Joe, extensive and valuable real-estate holdings, including some hotels, on the east coast of Florida in Jacksonville, Miami, Palatka, Daytona Beach, Fort Pierce, West Palm Beach, and other points, a controlling interest in the Florida National Bank & Trust Company of Miami, $25,000,000 of the debtor's first and refunding mortgage bonds and an undisclosed

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amount of the debtor's first-mortgage bonds. Ball and his sister, Mrs. Du Pont, have a substantial stock interest in the St. Joe Company.

There are 14 Florida banks owned or controlled by the Du Pont trust (including 1 owned by the St. Joe Company) and 3 other banks in which a substantial and perhaps controlling interest is held. These banks are collectively known as the Florida National group, and as of June 30, 1945, had combined capital surplus and undivided profits of about $14,668,000 and resources of about $328,662,000.[34] They doubtless have been in large part the medium through which the Du Pont interests have assisted directly and indirectly in the refunding of over $100,000,000, par value, of securities of political subdivisions of the State of Florida. The banks are located in St. Petersburg, Pensacola, Orlando, Lakeland, Key West, Ocala, Port St. Joe, Bartow, Starke, Chipley, and at Jacksonville, Miami, West Palm Beach, Daytona Beach, Fort Pierce, Belle Glade, and Coral Gables on the east coast. Some of these banks were acquired when they were insolvent during the depression, payment or guaranty of payment of their deposits being made by the Du Pont interests at the times of acquisition, and in some instances assistance was also given in the crisis to banks owned by other interests located in the same communities as the Du Pont banks.

The Florida National group of banks and St. Joe Paper Company have invested many millions of dollars in bonds of various political subdivisions of the State of Florida. Further detailed comment on the extent and nature of the interests of the Du Pont estate will be made in a subsequent section of this report.

Counsel for the Coast Line assert that a mere recital of the facts as to the Du Pont estate organization and its holdings gives no indication that the estate constitutes what is repeatedly referred to as a "dynamic empire," over which Ball as "emperor" yields ruthless and despotic power adversely affecting the entire economy of Florida.

As evidence that the Du Pont "empire" is "dynamic" and not "static," it was pointed out that the estate intends to make further large investments in the State of Florida. The estate already has large and extensive investments in Florida and expects to make further investments. There is no doubt that the estate has attained a position of great influence in the State, which position may be expected to become enhanced. The extent and variety of the interests of the estate are such that it is very doubtful that it would exercise control of a railroad property in the public interest.

[34] The figures do not include one small bank organized subsequent to June 30, 1945.

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Three instances are presented to support the charge of ruthless domination by Ball as the most influential trustee under the Du Pont trust: First, that during a time when office space was scarce in Miami, Ball required the tenants of a Du Pont office building in which the Florida National Bank and Trust Company is housed to do their banking with that company as a condition of their tenancy; second, alleged distribution of misleading propaganda in connection with the present proceeding; and third, alleged improper inducement of the Southern to intervene in this proceeding.

There is no denial of record by the St. Joe Company of the first of the above charges involving a restrictive rental clause. The second and third charges are reviewed later in this report.

The Coast Line also seriously questions the right or propriety of the trustees under the Du Pont trust (which is a charitable trust) to invest its trust funds in this railroad property. While we do not feel called upon to construe the provisions of the will creating the trust, we should ordinarily scrutinize very carefully, from the standpoint of compatibility with the public interest, the qualifications of a charitable trust to manage and operate a large railroad property.

The Coast Line contends that counsel for the St. Joe Company deliberately blocked a proper investigation into the question of the propriety of control by that company of the debtor by refusing to permit Ball to produce certain documents and data concerning the affairs of his company, which were not otherwise available to the Coast Line.

The Coast Line attempted to develop facts pertinent to the fitness of the St. Joe Company to control the debtor through addressing a letter to counsel for St. Joe Company on October 18, 1945, containing advance advice of the position Coast Line would take, namely, that a finding by the Commission that it would be compatible with the public interest for the St. Joe Company to control the debtor could be based only upon a record containing a full disclosure as to the terms of the will of Alfred I. du Pont, the ramifications of the estate, including its organization, policies, and procedures, its business relationships with railroads, shippers, or other persons who might have business dealings with a reorganized Florida East Coast Railway, and other pertinent information. Comparatively little of the information sought was introduced into the record. The Coast Line further sought to throw light upon the fitness of St. Joe Company to control the debtor in the public interest through extensive cross-examination of Ball. On cross-examination of Ball by counsel for the Coast Line, Ball was obviously a hostile witness. While responsive in his answers to some of the questions as to details of his own and Du Pont estate affairs, in answers to many other questions, he was

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vague, indefinite, and adroit. The apparent unwillingness to disclose facts pertinent in determining whether it would be compatible with the public interest for St. Joe Company to acquire control of the debtor's property constitutes an unsatisfactory attitude on the part of the principal witness for that company. While his counsel was not ordered to produce the information, he was advised that the presiding examiner considered that much of the matter should be of record. He was also advised that he should produce such evidence as he deemed necessary to support his case.

In view of the importance attached to the refusal by Ball to disclose allegedly material information with respect to the holdings of the Du Pont interests, it may be well to refer to the four items upon which the Coast Line relies, as stated by Coast Line counsel on oral argument. These are:

1. A statement of the holdings of the Du Pont trustees (as individuals) and of any corporation controlled directly or indirectly by the Du Pont trustees (as trustees) * * * which would have included the St. Joe Company * * * in the Florida National Group of banks.
2. The annual report of the St. Joe Company.
3. An itemization of the St. Joe Company's "investments at cost," $10,569,643.19.
4. An itemization of the St. Joe Company's "investments in affiliated companies," $1,204,173.68.

As to 1, counsel for the St. Joe Company objected to the witness being required to furnish the requested detailed personal information on various grounds, one being that the information requested was irrelevant since the witness had already testified that the Du Pont estate has control, directly or through the St. Joe Company, of all except two of the banks.

Number 2 above is considered the most important by the Coast Line and involved repeated requests by counsel for the Coast Line and refusals by the witness upon advice of counsel to supply the information, although the witness originally agreed to do so. At the hearing held prior to the final reopened hearings, the Du Pont estate had been requested by other counsel to disclose the prices at which it had acquired its bonds of the debtor and had refused to do so unless all other parties were also required to do so. The presiding officer at that hearing ruled that the information from all parties was desirable but did not order that it be produced. With one minor exception, none of the parties complied with the request. At the final hearing, counsel for the St. Joe Company, after examining the annual report of that company, refused to permit Ball to produce the report on the ground that it would disclose this information, and reiterated his refusal to do so in the absence of a like disclosure by the other parties. Finally after much discussion, counsel for the Coast Line stated

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that he was interested in obtaining the annual report not primarily for the purpose of ascertaining the prices at which the St. Joe Company acquired its bonds but in order to determine "the present real value * * * of the investments which are held by the St. Joe Paper Company." Counsel for the St. Joe Company replied that the balance sheet in the annual report showed cost values only.

Ball produced a condensed balance sheet which gave the information as to the company's investments as shown in 3 and 4 above, but without break-down. However, he enumerated all companies in which the investments are held.

Service to the public.—Evidence was offered by the Coast Line to demonstrate that a merger with the debtor will result in improved and expedited service on the debtor's line. As to passenger service, it is urged that locomotive runs could be lengthened, equipment pooled resulting in a more extenstive coordinated through-train operation, the Coast Line's 20 passenger traffic offices utilized for both carriers, through operation of diners more completely realized, advertising programs combined, train personnel coordinated, interline tickets eliminated, rendering unnecessary a separate examination of through tickets by the debtor's conductors, and adjustment of ticket refund and baggage claims simplified.

Some conveniences in these respects may result from unified control. While most, if not all of them would be such as could be realized, if deemed sufficiently advantageous, by arrangement between an independently reorganized debtor and the Coast Line, it is doubtful that any such agreement would be reached by the two carriers.

As to freight service, the evidence of public benefit is more substantial. The Coast Line points out that at present the debtor will not accept orders from its shippers for diversions and reconsignments of north-bound shipments at intermediate points on its line and will accept such orders at Bowden yard (where the present interchange on through traffic is made with the Coast Line) only if requests are received at that point at least 1 hour prior to the scheduled arrival of the debtor's trains. As a consequence, it appears to be the practice of shippers on the debtor's line to communicate, sometimes at extra expense and possible inconvenience, with Coast Line agents in order to obtain the desired diversions or reconsignments of their shipments.

However, in the event of a merger of the two carriers, shipments of freight from the debtor's line destined to points north and west of Jacksonville would still be subject to routing over several different railroads north and west of Jacksonville, and the record shows that the general shipping practice is for a consignor to request a diversion or reconsignment directly with the road affected. There might be some

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benefit to shippers in extended stoppage in transit privileges, although witnesses for the Jacksonville Chamber of Commerce, Greater Miami Traffic Association, and the Southern Railway Company minimized the advantage that would result in that respect from any consolidation of the railroads.

A saving would accrue to shippers in the event of unification of the carriers through the automatic elimination of joint-line differentials over single-line hauls in the case of some intrastate rates at present prevailing on certain low-grade commodities. There was testimony, however, that, if a large movement of these commodities occurs enabling them to be moved in trainload quantities, the practice is to establish a specific commodity rate for the particular movement.

There would be saving to shippers in case of a merger on reciprocal switching charges on shipments to or from industries located on the debtor's or Coast Line's tracks at Jacksonville and South Jacksonville. While the traffic manager of the Jacksonville Chamber of Commerce, testified that the majority of the industries in Jacksonville are not located on the Coast Line's or debtor's tracks, but on tracks of Southern Railway, Seaboard, and Jacksonville Terminal Company, the Coast Line in its exceptions to the examiner's proposed report calls attention to the report in *Switching at Jacksonville, Fla.*, 266 I. C. C. 7, which states:

> Industries and docks at Jacksonville served by respondent (St. John's Terminal Company), the Coast Line, and Seaboard, respectively, total approximately 95, 120, and 115, respectively, with one on the Florida East Coast, 10 on the Jacksonville Terminal, and 5 on the Municipal Terminal, the grand total being approximately 355, 28 being served by 2 or more carriers jointly.

It appears that there would be little if any economy or convenience served by a pooling of either locomotive or freight-car equipment. Refrigerator cars are furnished the debtor by private car companies and by the Fruit Growers Express on the basis of demand for the cars, and normally the number of loaded boxcars coming on to the debtor's line from the north and west exceeds the number of those destined northward.

Any lack of cars for north-bound traffic from the debtor's line is supplied by its connections from their excess cars. The debtor has a good supply of locomotives. It might be possible to effect some economy, not otherwise obtainable by arrangement between an independent debtor and the Coast Line, in utilization of power by longer runs if the locomotives of both carriers were owned by one company, but this does not appear to be an important consideration.

There is considerable evidence regarding the feasibility of extending third-morning market delivery at northern markets to cover addi-

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tional perishable shipping sections on the debtor's line through savings in time which would result from combined yard operations at Jacksonville, in the event of a merger. While there was some testimony to the effect that there is no particular demand for that service, the record shows that the Coast Line and Seaboard are maintaining the service from other sections of Florida and that it is well patronized.

There also is evidence that a unification of the properties will result in a greater use of Coast Line-debtor connections at interior junctions, viz, Palatka, Benson Junction, and Lake Harbor. Upon merger of the two companies, the Coast Line asserts that the junction point could be used which would afford the most efficient and economical service. At present, routes through Benson Junction and Palatka are open only on intrastate traffic, since the debtor wishes to preserve its long haul on interstate traffic by interchange at Jacksonville. In rebuttal, testimony was offered to show that the Jacksonville route is preferable from an operating and service standpoint to routes via the Palatka and Benson Junction connections, both of the latter points being on branch lines. The vice president in charge of traffic of the Coast Line stated that he did not think there is any intention of the Coast Line to divert traffic which formerly moved over the debtor's line to Jacksonville by routing it through the Lake Harbor, Benson, or Palatka junctions. The St. Joe Company asserts that, in any event, we have the power under the Interstate Commerce Act to establish the short-haul routes if they are found necessary in the public interest. The situation with respect to the Lake Harbor junction is the only one stressed by the Coast Line on brief as resulting in important advantage. The plant of the U. S. Sugar Corporation is located at Clewiston, 10 miles west of Lake Harbor, and a large part of the sugarcane used by the plant is brought in to Lake Harbor from the eastward Canal Point area by the debtor's engines and crews and handled from Lake Harbor to Clewiston by those of the Coast Line. A single operation could result from unification of the two roads with a consequent saving in the number of locomotives used in the cane grinding season.

The Coast Line contends that unification of the two roads would permit the abandonment of the Bowden yard at South Jacksonville, where the debtor now classifies the freight for interchange with the Coast Line at Moncrief, and that yard operations would be consolidated at the latter's Moncrief yard resulting in a facilitation of freight movement. Upon this point the record is inconclusive, probably necessarily so.

The Coast Line also contends that a consolidation of the freight stations of the two carriers in Jacksonville would result in greater

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convenience to the public, in that one of the two warehouses could be made into a single delivery station and the other into a single receiving station. Aside from any resulting economy in expense, which will be discussed later, the possibility of the unification better serving the public convenience is minimized by the fact that the two stations now adjoin each other, one-half of the same building being utilized by each carrier.

As to the promotion of efficiency of transportation service generally by reason of improvement in the physical properties of the two carriers, the record does not furnish a basis for a conclusion that it would be materially affected whether the debtor's properties are operated independently or as a part of the Coast Line. The Coast Line has effected in the last few years a really outstanding improvement and rehabilitation of its roadbed and other properties, including, as to equipment, the purchase of 53 Diesel road passenger units, 36 Diesel road freight locomotives, 52 lightweight passenger-train cars and 11,776 freight-train cars. The debtor has also purchased new equipment and is now embarked on a rehabilitation program which has been described in our former reports in this proceeding, and for payment of which provision has been made.

A very considerable amount of evidence was devoted to the testimony of two witnesses who introduced independent comparative studies of certain selected ratios, obtained from railroad operating statistics compiled by us, to determine the relative efficiency of operation of the debtor and of the Coast Line during the period 1936–40, a period selected by both witnesses as one of normal operations. One of these studies was made by Leonard P. Ayers for Alleghany Corporation, intervener and owner of $899,000, principal amount of first and refunding bonds purchased for investment in the open market at an average price of 65.97. Alleghany Corporation is one of the large owners of these bonds favoring control of the debtor by the St. Joe Company. The other study was made by J. C. McWilliams for the St. Joe Company.[25]

While a very few of the ratios were favorable to the Coast Line, the general result from both studies indicated in the opinion of the witnesses that the debtor was operated during the period under consideration more efficiently than was the Coast Line, especially in the matters of utilization of manpower, utilization of equipment, and consumption of fuel. The latter company attacks the inferences

[25] T. C. Maurer, traffic manager for the Jacksonville Chamber of Commerce, intervener, also testified as to an investigation made by him on the same subject. His study was based principally on the study introduced in evidence by McWilliams, supplemented by additional Commission data for the year 1943. His conclusion was the same as those of the other two witnesses.

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drawn from these studies on several general grounds and contends that the studies, as used by the witnesses, are wholly unreliable as measures of operating "efficiency," whatever that term as used by the witnesses may signify. The Coast Line objects to the use of the period 1936–40, as not indicative of present conditions particularly in view of the subsequent heavy rehabilitation expenses of the Coast Line, but suggests no substitute period other than an implication that the war period would be more indicative of relative efficiency, since demonstrated ability to handle the heavy wartime traffic is the better measure. Among other Coast Line criticisms of the studies are the dissimilarity of the two roads. The Coast Line states that it has relatively more light density mileage than the debtor and performs more kinds of transportation. In rebuttal, a witness for the Coast Line presented another study prepared in the same manner as the Ayers and McWilliams studies, which indicated that the Western Pacific Railroad Company during the 1936–40 period was operated more efficiently than the Atchison, Topeka & Santa Fe Railway Company. The witness asserted that this shows the absurdity of the results indicated by the Ayers and McWilliams studies but admitted on cross-examination that, other than as shown by his study, he had no knowledge of the relative operating efficiency of the two railroads. The St. Joe Company draws a distinction between relative earning power of two carriers and relative operating efficiency, as disclosed by a study of their operating expense statistics.

The respective positions taken by the Coast Line and the St. Joe Company on the question of operating efficiency were plainly stated by counsel at the hearing as follows:

Mr. Bourne (principal counsel for the Coast Line): We do not take the position, and have never taken the position, that the Florida East Coast is not an efficiently operated railroad today for an independent railroad. Our position is that a single-line operation of the two roads would be in the public interest.

Mr. Turney (principal counsel for the St. Joe Company): And our position is, and these exhibits are intended to show that under independent operation as a single railroad it was and would be operated more efficiently than as a part of your system.

Summarizing, we find, from a review of all the evidence that there would be a betterment of service to the public resulting from a unification of the two properties.

Prospective savings from unification.—The amount of savings in operating expenses which might be expected to result from a merger of the two companies was a subject of much evidence and wide disparity of opinion. It is admittedly a matter not susceptible of exact determination nor would the greater part of any prospective savings be real-

ized within the immediate future. The St. Joe Company takes the position that the direct savings would be relatively small and would be more than offset by a lowered efficiency in operation.

The principal ultimate savings doubtless would result from an eventual unification of the executive and supervisory forces of the two carriers. This saving is estimated by the Coast Line at between $400,000 and $500,000 per year, no details being furnished, in view of the fact that the Coast Line plan contemplates a general retention of present personnel of the debtor including both officers and employees. Such savings as would be realized ultimately would come about mostly through voluntary transfers, deaths, retirements and resignations. The St. Joe Company offered no rebuttal evidence to this general estimate of savings but comments upon it in its brief, as being excessive, in view of the fact that the combined traffic and general expenses of the debtor in 1940 did not exceed $765,000.

One of the most contested questions is the amount, if any, of savings which would result from an abandonment of the debtor's Bowden interchange yard at South Jacksonville and consolidation of the interchange with the Coast Line at the latter's Moncrief yard at Jacksonville. The Coast Line estimates the eventual savings at $125,972 a year, comprising $38,832 savings in pay roll of yardmasters and clerks based on 1944 expenses and $87,140 in wages of yard enginemen and yard trainmen, plus savings in fuel and supplies for 1,642 switch engine "tricks," and after subtracting the estimated cost of operating the debtor's freight trains over the additional 11 miles into the Coast Line's Moncrief yard. The St. Joe Company in a detailed analysis of the claimed savings concludes that there would be some comparatively slight "potential" saving in personnel which would be much more than offset by an actual loss from inferior supervision of yards by Coast Line management. It points out that the business at Moncrief yard increased 56 percent in volume between 1940 and 1944 but that instead of the unit cost per car declining, it actually increased from $1.47 to $1.57, after allowance for the increased cost of labor and materials. One factor offsetting the savings claimed by the Coast Line in the substitution of road movement for switching between Bowden and Moncrief yards, would be the cost of additional switching required in the movement of cars from Moncrief to the Seaboard connection and to the Jacksonville station.

In 1934, the debtor and the Coast Line investigated the feasibility of consolidating these yards. The officers conducting the investigation unanimously recommended against it. In 1937, another study was made and the previous findings reaffirmed. The Moncrief yard was at that time found inadequate to handle the increased business efficiently.

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While the shops at Moncrief have been modernized and enlarged since 1937 at a substantial cost, the evidence is not conclusive that the other yard facilities have also been sufficiently amplified. The two yards can be consolidated in the future without merger of the companies if each of the companies shall later agree to enter into a joint-facility contract. In such case, however, it is reasonable to assume that the particular advantage to each carrier to be derived from such an arrangement would be the carrier's controlling consideration in agreeing to it.

The Coast Line estimates that a unification of operations of the Coast Line and debtor's freight stations at Jacksonville will save $103,200 a year. As already stated, these stations are at present located in the same building. There is no evidence that the present duties of the employees of both companies do not now fully occupy their time or that these duties will be lessened in any material degree in the event of consolidation. Very little of the work now performed by them is of a nature that could be dispensed with if the operation of the stations were unified. Some savings might result from the elimination of some supervisory officers.

The Coast Line estimates that other eventual savings, of $94,582 a year, would follow a coordination and consolidation of off-line traffic offices of the two carriers. The St. Joe Company criticizes this estimate as based on an unsupported assumption that practically all the debtor's outside traffic agencies can be abolished. It contends that a study and consideration in detail of "the work of the employees proposed to be eliminated and how that work is to be done by the merged company" would not support the assumption. The St. Joe Company further contends that, if the present traffic agencies of the Coast Line are providently operated, the addition to their present duties of the work performed by the debtor's agents, which involves problems peculiar to the debtor, will result in the merged company being required to augment its staff to an extent approximately equal to the debtor's present force. In this connection, the St. Joe Company points out that the Coast Line at present maintains separate outside traffic agencies for its subsidiaries and affiliates. The Coast Line counters with the assertion that such separate agencies are in connection with subsidiaries which are separately operated and that in maintaining the separate offices it follows the usual practice. The Coast Line plan contemplates a merger of the debtor with it and no separate operation.

The remaining principal savings expected by the Coast Line to result from a merger involves a unification of the two purchasing departments. The Coast Line estimates these savings at $200,000 a year,

one-half of which would be realized from a lower cost than that now paid by the debtor in acquiring and treating its ties and timbers. A considerable part of the savings would represent elimination of present off-line transportation charges, since most of the debtor's ties would be purchased along the Coast Line's right-of-way. However, the transportation of the ties and timbers to the debtor's line would still have to be performed, so the saving in that respect would seem to be more a matter of bookkeeping than a real economy. Since the base price of green ties is at present the same for both roads the only other probable saving would be in treatment costs. These are somewhat higher at present for the debtor which has its ties and timbers treated in a commercial plant, while the Coast Line owns and operates its own plant. Any saving in this respect would be less than claimed by the Coast Line, if interest on investment and depreciation of the plant were calculated in arriving at the Coast Line treatment cost.

Other savings expected by the Coast Line to result from a merger are (1) $50,000 a year from a consolidation of the debtor's storehouse at Bowden with the Coast Line's Jacksonville storehouse and a reduction in the activities of the debtor's St. Augustine storehouse, and (2) $50,000 a year from a reduction in inventory and handling costs including a return on the investment in the inventory.

As to both these expected savings, we conclude that they would be tangible, but the record is not sufficient to definitely evaluate them.

From a review of all the facts of record on prospective savings from unification of the two railroads, we find that the eventual savings, particularly from the consolidation of the general offices and executive forces should be substantial in amount. While difficult to estimate, all of the economies resulting from the merger should amount to between $350,000 and $1,000,000 per annum.

Interests of the debtor's employees.—A considerable portion of the record is devoted to the effect upon the debtor's employees of a merger of the debtor with the Coast Line. The Railway Employees Executive Association intervened in opposition to a merger, and the general chairmen of the various railroad brotherhoods testified at the hearing. The Brotherhood of Railroad Trainmen intervened separately and also offered testimony opposing a merger.

In cases heretofore decided,[16] we have stated that the public interest embraces the whole public and the public as a whole, and that the interests of employees in changes of management, ownership, or operation of companies by which they are employed are of public as well as private interest.

[16] *St. Paul Bridge & Term. Ry. Co. Control*, 199 I. C. C. 588, 595. *Associated Rys. Co. Acquisition and Securities*, 228 I. C. C. 277, 336.

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The vigorous objections of the employees to control of the debtor by the Coast Line centered principally on their apprehensions concerning (1) loss of jobs, (2) loss of seniority right, (3) loss of pensions, and (4) displacement from their present homes, particularly with regard to the debtor's employees located at St. Augustine.

On behalf of the Du Pont estate, Ball testified that if the St. Joe Company obtains control of the debtor's railroad, no competent officer or employee of the debtor should feel the slightest concern about his or her future with the new company, as it would be the policy of the Du Pont estate to continue the present organization. The record supports a conclusion that the Coast Line has made a similar pledge. It would seem, however, that under a merger the conditions under which the debtor's employees would retain their employment would be in many instances different from those now prevailing.

The assurances given by the Coast Line of protection of the debtor's employees under the terms of the Washington Job Protection Agreement and its other assurances, to the extent it was able to make any at the time, have been hereinbefore recited in the description of the Coast Line plan.

The problem of protection of employes is ever present in the case of consolidation or merger of operations of two railroads. In many cases the problems have been solved in ways apparently acceptable to the parties concerned. While a merger in this instance may offer obstacles of unusual difficulty, especially with respect to the necessity of a considerable number of the debtor's employees being required to move their homes at a time of severe shortages of living accommodations, it is reasonable to expect, in the event a merger is approved, that some equitable arrangement could be reached which will minimize, even if it will not wholly eliminate, immediate hardships, which may have to be endured by some of the debtor's employees. These difficulties should not in themselves prevent approval of a merger, if, on the entire record, it is found to be necessary in the public interest and an equitable feature of a plan of reorganization, especially since an offsetting consideration might be a greater degree of stability of employment in the future for the debtor's employees under operation of its railroad as a part of a large system rather than as an independent carrier.

In *Atlantic Coast Line R. Co., Purchase, supra*, we conditioned our approval and authorization of the purchase of the properties of the Atlanta, Birmingham and Coast Railroad Company by the Coast Line upon extension to the employees involved of the benefits of the Washington Job Protection Agreement as to employees represented

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by the Railway Labor Executives' Association, and reserved jurisdiction to make additional findings and impose such conditions as may be required by section 5 (2) (f), if upon petition by any of such employees not protected by such condition, or their duly authorized representatives, it should appear that their interests have been or will be adversely affected by anything done or to be done as result of our authorization within 4 years from the date of the order therein. No such petition has yet been presented to us.

Our approval of a plan which contemplates a merger will include a provision that, as a condition of approval of such a merger, there shall be a fair and equitable arrangement to protect the interests of the railroad employees affected, as required by law[17] and similar to the conditions imposed in *Chicago & N. W. Ry. Co. Merger*, 261 I. C. C. 672.

Representations of shippers, communities, and public representatives.—The witnesses who testified in this classification fall into three categories:

(1) Those favoring Coast Line operation and control.
(2) Those favoring Du Pont estate operation and control.
(3) Those favoring independent operation and control.

The witnesses in the first category were largely shippers; those in the last two categories principally community interests and public representatives. There was a considerable number of witnesses in each category.

The witnesses in the third category above, which were greater in number than those of either of the other two categories, testified on an issue that is not before us, for there is no proposal on the record for abstract "independent" operation and control. On basis of the record, control must be awarded either to the Coast Line (favored by the witnesses in the first category) or to the Du Pont estate (favored by the witnesses in the second category), for no other proposal for disposition of the debtor's property has been presented to us.

The witnesses favoring Coast Line operation and control included shippers whose residences and business locations bracketed the entire Florida peninsula, among them some of the most important users of the Florida East Coast Railway. The reasons given by those witnesses in favor of a merger were as varied as their occupations. In general, they emphasized the continued good service, based upon experience, rendered by the Coast Line at all points and a definite preference for operation of the Florida East Coast as part of a trunk-line system. From a trunk-line system, specifically the Coast Line, they receive valu-

[17] See *St. Louis S. W. Ry. Co. Reorganization*, 252 I. C. C. 325, 366, and *Chicago, R. I. & P. Ry. Co. Reorganization*, 249 I. C. C. 297, 326.

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able market information through an extensive freight-traffic organization, information on shipments in transit, service in connection with reconsignments, diversions and tracing of shipments beyond the terminals of the railroad with whom they deal, valuable rate information, and other services. They preferred trunk-line operation because it meant to them more equipment, time saved, and operating economies. They cited the help of the Coast Line in building up agricultural resources and emphasized Coast Line's long experience in handling fruits and vegetables. To various of those witnesses, a merger meant a single-line haul, elimination of switching charges, better cross-State transportation, and other advantages. Although improved service was uppermost in the minds of those shipper witnesses, many of them welcomed the increased competition which a merger would bring about through affording opportunity for short hauling the originating line north of Jacksonville. At present, the Florida East Coast is assured of all rail transportation between West Palm Beach and Jacksonville (excluding both points) and has no interest in hauls north of Jacksonville. If the Coast Line and Florida East Coast are unified, many of the shippers feel they will be enabled to stimulate competition in service by short hauling the Coast Line north of Jacksonville if they are unable to obtain the service to which they feel entitled, in view of the Coast Line's promise to maintain all existing through routes via Jacksonville in connection with Seaboard Air Line Railroad Company and Southern Railway Company.

While counsel for St. Joe Paper Company undertook to discount the testimony of all witnesses not actually residents of the east coast of Florida, the testimony of witnesses from other parts of the State as to actual experience with the Coast Line is valuable as indicative of what shippers on the east coast can expect, since the situation on the east coast after unification will be similar to that in other parts of the State at the present time.

While some of the witnesses opposing Coast Line control of the debtor's property expressed preference for control by the Du Pont estate, a greater number simply expressed preference for "independent" operation and control as opposed to trunk-line operation and control, without specific preference for Du Pont operation and control. Many of the witnesses favoring "independent" operation and control expressed reasons for such preference, which were in part apparently actuated by pride in a local institution, in part intangible and speculative, in part apparently based on misinformation and in part based upon rejection of the Coast Line's representations with respect to maintaining routes north of Jacksonville and retaining all of the debtor's employees in service at the time the merger is consummated.

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Some of the witnesses opposed to Coast Line operation and control expressed belief that an "independent" management would be more accessible in connection with rail transportation problems, and would be more sympathetic to the transportation needs and problems of the east coast of Florida and in better position to foster the special interests of the east coast than would be the Coast Line with its headquarters more remote and with divergent interests and extensive mileage throughout the Southeast.

Despite the Coast Line's assurances to the contrary, some of the witnesses seemed to fear that the Jacksonville gateway for shipping north, east, and west either would not be kept open in the event of a merger of the debtor with the Coast Line or that coercion would be exerted by the Coast Line on shippers from the debtor's line to preserve to the Coast Line its long haul; this being directly counter to the testimony of other shippers who would welcome the opportunity to short haul the Coast Line to stimulate competition in service should occasion arise when they might feel they were not receiving the service to which they were entitled.

Some of the witnesses seemed to fear that a monopoly of Florida transportation would be obtained by the Coast Line and that the activities of the east coast ports would be hampered.

This latter point of view is expressed by the Greater Miami Traffic Association, intervener, in connection with a discussion in its brief of the effect of control of the debtor by the Coast Line on continued growth of lower east coast ports, particularly Port Everglades and the port of Miami. The association asserts that real competition exists between these ports and Port Tampa on the west coast, which is served by the Coast Line and which is about 195 miles closer by rail to Jacksonville. The association insists that, while the Coast Line, upon acquiring the debtor, might be friendly to the lower east coast of Florida, it is to be expected that the Coast Line would not be interested in maintaining the present parity in rates between Jacksonville and points beyond and Miami, and Port Everglades with such rates to Port Tampa because of the shorter rail haul and the Coast Line's large investments at the Port of Tampa.

Similarly, the Jacksonville Chamber of Commerce, intervener, fears that its port would be adversely affected if the Coast Line acquired the debtor. It believes that the Coast Line would then tend to discourage water shipments from north Atlantic ports to Jacksonville, thence via debtor's line to Florida east coast points. This chamber of commerce asserts that it would be to the interest of the Coast Line to favor the port of Savannah, which is on its through line northward from Jacksonville, in order to obtain the longer haul. At present the debtor as

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an independent carrier with its northern terminus at Jacksonville maintains water-rail tariffs between north Atlantic points and lower Florida east coast points.

While apparently all of the communities along the east coast of Florida which presented testimony favored "independent" operation of the debtor's line, certain of them make special representations in support of their positions. Fort Pierce is the principal shipping point of the Indian River citrus-growing section of Florida, which comprises the territory lying roughly between Stuart on the south and Titusville on the north. Fort Pierce is located in St. Lucie County, and both the city and county intervened in this proceeding in favor of independent operation of the debtor's line. The Indian River section is served only by the debtor. The Coast Line serves a much larger citrus-producing area lying to the west and in the central part of Florida. Fort Pierce and St. Lucie County believe that, since the latter territory produces a much greater tonnage, and since the Coast Line in serving it is subject to competition, the Coast Line, if it acquired the debtor's line, would still favor the central and west coast sections to the detriment of the Indian River district, as for example in supplying cars in times of shortage of equipment. Furthermore, Fort Pierce is at present a division point on the debtor's line, and the city is apprehensive that the 75 to 100 railroad employees who live there might be displaced, in the event of a merger.

New Smyrna Beach is also located on the east coast of Florida between Palm Beach and Jacksonville. Its principal concern is that reductions in railroad personnel and facilities would be made in spite of the Coast Line's expressed intention not to abandon any of the New Smyrna Beach railroad facilities. This community points out that the assessed value of the debtor's property at this place is $590,178, amounting to one-tenth of the total assessed value of all property in the city, and that the debtor paid taxes in 1945 amounting to $10,227. It also asserts that the debtor is the largest user of city utilities and that 368 of its employees reside in the city, of whom 163 own homes and 205 others maintain households.

St. Augustine and St. Johns County, in which it is located, also protest the acquisition of the debtor by the Coast Line. St. Augustine, the county seat, has the principal shops, general offices and hospital of the debtor. About 900 railroad employees live there, and with their dependents approximate one-third of the 12,500 inhabitants of the city. The debtor maintains the principal pay roll and is the largest taxpayer. This community contends that the proposed elimination of the general offices of the debtor at St. Augustine upon merger with the Coast Line would be a catastrophe to the city and surrounding territory.

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In answer to these representations of opponents of a merger, the Coast Line refers to its assurances that the Jacksonville gateway will remain open in the event of a merger and asserts that in such case it will be to its advantage to furnish the best possible service to shippers located on the debtor's line in order to obtain and justify through routing over its own line. The Coast Line further contends that a merger will not lessen existing competition since it will be an "end-to-end" merger of a relatively small road with a strong trunk line between which no competition of parallel lines exists. Coast Line contends that a merger will constitute a logical and natural extension of its line into a section of Florida which is not served by it at present and in which competition now exists from Palm Beach southward to Miami between the debtor and the Seaboard. A merger of the Coast Line and the debtor would result in the Coast Line then having a through line competitive to the Seaboard the entire distance from northern points to Miami. The competition between it and the Southern Railway Company would remain as at present.

The Coast Line further asserts that the west coast of Florida, although part of the same governmental unit as the east coast, does not constitute a part of a same transportation unit and that it is purely artificial to combine the two sections in estimating the extent of transportation monopoly in Florida. In any event, it contends that a merger with the debtor would result in the Coast Line "system" having only 51.48 percent of the total tons of freight transported in Florida based on 1940 figures, as compared with 34.38 percent carried by the Seaboard.

As to the alleged detriment to the east coast ports and lack of incentive to develop the east coast in the event of a merger, the Coast Line's vice president in charge of traffic testified that the Coast Line will, in case of a merger, continue its present policy of seeking to develop to the utmost all its territory without discrimination. He further stated that the Coast Line, in cooperation with the debtor, has sponsored and assisted in obtaining export and import rates favorable to east coast ports and that its interests in that direction would be increased rather than diminished if his company were permitted to serve those ports with its own rails.

The witness also stated that in normal times 95 percent or more of the export and import tonnage via Tampa and Port Tampa consists of phosphate rock out-bound and petroleum products in-bound; that proximity of the phosphate mines to Tampa makes it unlikely that an export movement will develop via east Florida ports, but that an important import movement of petroleum and petroleum products will continue in the future as in the past through both east and west coast

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ports. As to the shorter rail haul between Tampa and Jacksonville than from southeast ports to Jacksonville, the witness claims that the resulting greater divisions of the through rates would be an added incentive to the Coast Line, in the event of a merger, to see that there would be no discrimination against Miami, and that an independent debtor line unaided would be handicapped in the matter of obtaining rate adjustments.

While residents, shippers, and communities located in the territory directly served by the debtor's line may feel apprehensive that the Coast Line through its control might favor other sections of the State at the expense of the east coast, it seems clear that it would be to the Coast Line's advantage to foster the growth and development of the east coast to the same extent as any other territory which it serves in Florida. The assurance of Coast Line officers has been given that it will serve all its territory impartially.

As to the effect on St. Augustine and St. Johns County of displacement of railroad employees by elimination of the debtor's general offices there, the Coast Line minimizes the number of employees affected and the effect upon the community of the resulting loss of taxes. It asserts that if the people of St. Augustine are successful in the development of tourist traffic the effect of a unification of the Coast Line and the debtor will not be as serious as they fear. On oral argument, Senator Pepper, in advocating the Coast Line plan, suggested that the Coast Line might decide to leave the facilities at St. Augustine as they are at present. This, however, would obviously eliminate the principal source of any substantial savings which might be realized from the unification.

In general the Coast Line asserts that the prevailing sentiment of residents of the east coast of Florida against the merger is not based on valid reasons. It believes that it is partly induced by "the potency of the name Du Pont although none of the trustees under Mr. Du Pont's will is a Du Pont by blood," partly by the belief that the east coast needs capital and can obtain it from the Du Pont trust and partly by a preference "always entertained by some" for a small industry or railroad. The Coast Line also charges that the sentiment has been induced by misleading and effective propaganda of the Du Pont interests and that such a sentiment is not a measure of public interest.

One evidence of misleading propaganda referred to by the Coast Line on brief is a statement by Ball as quoted in a Miami newspaper to the effect that the Jacksonville gateway for shipping north, east, and west must not be monopolized by one road. This is safeguarded by the provision in the Coast Line plan and the promise of its officers

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on the record that this gateway will be kept open in the event the Coast Line obtains control of the debtor.

Another charge of misleading propaganda which is urged by the Coast Line to have induced the predominant sentiment on the east coast of Florida for independent operation of the debtor's line is another purported statement by Ball, as quoted in the same issue of the Miami newspaper, that the Coast Line's proposal in its plan to pay the debtor's first and refunding bondholders $133 cash per $1,000 bond from the debtor's $24,000,000 cash on hand is tantamount to paying the bondholders with their own money. The Coast Line on brief argues that Ball thereby implied that the entire $24,000,000 of cash could be available for distribution to the bondholders and that he gave no consideration to the amounts of approximately $12,000,000 and $8,700,000 required to be reserved under the approved plan to pay off the debtor's first mortgage and as a reserve for payment of improvements to the debtor's line, respectively. The question of whether the cash payment to the debtor's bondholders under the Coast Line plan would be paid out of the debtor's cash was a matter of doubt and capable of differing opinions, especially at the time of Ball's alleged statement (1945), as evidenced by the Coast Line's successively changing offers with respect to such cash payment, the last of which was made on exceptions to the proposed report which was issued on June 21, 1946. This proposed cash payment offer by the Coast Line and the probable source from which it would be made will be discussed hereinafter.

Another item of alleged misleading propaganda involves an implication by the Coast Line that a Putnam County Chamber of Commerce poll on the matter of future control of the debtor's line "must have been widely influenced" by a statement in a Palatka, Fla., newspaper that independent control would be to the advantage of Palatka in affording improved train service between Atlanta, Ga., and Miami, Fla., via the Southern Railway through Palatka. Whether or not this is a correct statement of the fact is beside the question, as the record is devoid of any evidence that Ball or any representative of the Du Pont interests had any part in inspiring the newspaper article or in influencing the vote, of the citizens of Putnam County. The president of the chamber of commerce testified that he did not discuss the matter with anyone representing the Du Pont interests and that to his knowledge no representative of those interests had ever approached the chamber of commerce or its board of directors. The witness fully stated on the witness stand the reasons for the convictions held by his board of directors and recited the results of their study upon which

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the members based their convictions. They communicated these conclusions to their fellow citizens on post-card ballots.

Other allegations made by the Coast Line of misleading propaganda include suggestions made by Ball during his testimony for improvement of the debtor's service, some of which, as for instance hourly lightweight passenger train service between Miami and West Palm Beach, the Coast Line believes wholly impractical. Other allegations of misleading propaganda include the distribution of a Du Pont controlled bank of pamphlets issued by employee organizations and communities on the east coast of Florida, which pamphlets contain statements the Coast Line believes wholly unsubstantiated.

Four congressional representatives of the people of Florida have expressed their views in respect of the proposed merger. These are Senator Charles O. Andrews, whose statement of views was read into the record at the hearings; Senator Claude Pepper, who filed a memorandum in favor of the merger and also participated in the oral argument before the Commission to urge a reopening of this proceeding and in the oral argument on exceptions to the examiner's proposed report; Representative J. Hardin Peterson, who urged the reopening, made a statement at the reopened hearings, filed a brief in favor of the merger, and had a statement of his views presented at the oral argument on exceptions to the examiner's proposed report; and Representative Joe Hendricks, who expressed his views in opposition to the merger, by letter addressed to the Chairman of the Commission.

Many of the arguments for the merger advanced by Senator Pepper have been covered by previous discussion in this report and do not need to be repeated. He particularly warns that, in his opinion, there will be a grave danger to the interests of the people of Florida if control of the debtor's line is permitted to be transferred to the large financial interests of the Du Pont estate, which he states is dominated by Edward Ball. In this connection a parallel is drawn with the situation in *Piedmont & N. Ry. Co. Construction*, 138 I. C. C. 363. In that case the applicant applied for authority to extend its line. Its application was supported by all parties except the competing railroads. We denied the application on the ground that the extension would constitute an unnecessary duplication of existing lines, which adequately served the territory. In the course of our opinion we found that the Duke interests would exercise effective control of the applicant and referred to that situation as aggravating the competitive nature of the enterprise. At page 401, we said:

> The competitive nature of the enterprise is aggravated by the association of the applicant with large interests which have the power to control or influence much traffic on other grounds than transportation service.

Attention is also called to the concurring expression of Commissioner Eastman where he said, at page 402:

> The evils of interrelation between transportation lines and industries which they serve are manifest. Such arrangements breed privilege and preference, and run counter to the spirit and I believe also, in many cases, the letter of the law. There are enough at present without adding to the sum total, and I trust that we shall soon be able to test the legality of existing interrelations of this character.

Representative Peterson expresses the belief that successful independent operation of the debtor which serves a restricted territory, is precarious, and that its merger with the Coast Line will assure it a safe, permanent future, will be consonant with congressional policy favoring unifications in order to save weak lines of railroad, and will further the public interest in assuring adequate service.

At the oral argument upon the reopening, Representative Peterson stated that he was authorized to speak also for Senator Andrews and Representative Hendricks, and at the hearing Representative Peterson read into the record a written statement by Senator Andrews. Senator Andrews' written statement included reference to congressional policy with respect to consolidation of weak railroads with strong systems, and also included an exchange of letters between Ball and Senator Andrews wherein Ball took Senator Andrews to task for urging the reopening, and Senator Andrews replied to the effect that his interest in the proceeding was the welfare of the people of the State of Florida.

Representative Hendricks states in a letter addressed to us that he had advocated reopening the hearings but that his review of a summary of the evidence coupled with a personal investigation of the situation during a trip to Florida has led him to the conclusion that a transfer of the property to the Coast Line without a public sale would be inequitable, that operation of the debtor's line by the St. Joe Company will be more beneficial to the public than by "absentee owners" having other competitive interests, and that a merger with the Coast Line would adversely affect the interests of the employees of the debtor.

Objections of Southern and Seaboard to the merger.—The Southern Railway Company and subsidiary companies, collectively known as the Southern Railway system and hereinafter referred to as the Southern, intervened in this proceeding, introduced evidence and filed a brief in opposition to a merger of the debtor's property into the Coast Line and in favor of operation by the St. Joe Company.

Southern Railway Company's entry into Jacksonville is over the rails of the Coast Line, from Hardeeville, S. C., for traffic to and from the north and east, and from Jesup, Ga., for traffic to and from

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the west. The agreement under which Southern uses Coast Line tracks expires December 1, 1999. There is an accompanying traffic agreement between Southern and Coast Line by which free interchange between the Southern and the debtor is assured, and also under which the Southern participates to an important extent in the movement of traffic to and from points on the Florida peninsula served by the present lines of the Coast Line. If the debtor should be merged with the Coast Line, the situation of the Southern as to the east coast of Florida would be the same as it has been for many years as to the central section and the west coast of Florida.

The Georgia Southern & Florida Railway, a subsidiary of the Southern, with which it connects at Macon, Ga., reaches Jacksonville and Palatka, Fla., with its own lines and interchanges traffic at both points with the debtor. The Georgia Southern & Florida Railway is a light density line and its interchange with the debtor, mostly of traffic to and from the west is of great importance to the Southern. Oher light traffic density lines of the Southern system which are benefited by traffic received by the Southern's interchange with the debtor are the lines between Columbia, S. C., and Savannah, Ga., and between Macon and Brunswick, Ga. These lines serve the ports of Brunswick and Savannah, and the Southern contends that they are important in affording the ports competitive service.

While Southern, Seaboard, and Coast Line all compete for traffic to and from the Florida peninsula, including the east coast, the competition is not in all instances comparable. Southern operates through passenger-train service to and from the west and has competitive freight routes to and from the west, but, because of the nature of its line, and some mileage handicap, does not operate through passenger-train service to and from the east, and does not seriously compete for freight traffic to and from the east, not attempting, for example, to operate the third-morning delivery at northern markets as provided by Coast Line and Seaboard. Conversely, Seaboard has both passenger and freight routes to and from the east comparable with those of the Coast Line, but has no comparable competitive service to and from the west, either passenger or freight. Moreover, Seaboard reaches the territory served by the debtor's line, West Palm Beach and south with its own rails, and competes with the debtor for traffic to and from that territory. Seaboard also competes at Jacksonville with Southern and Coast Line for freight traffic moving to and from the debtor's entire line, but operates no through passenger-train service in connection with the debtor. Coast Line is in position to compete, and does compete, both with Southern to and from the west and with Seaboard to and from the east. Coast Line operates

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through passenger-train service in connection with the debtor to and from both east and west, and very nearly one hundred percent of the debtor's passenger interchange is with the Coast Line.

The Southern has a considerable investment at Jacksonville in the St. Johns River Terminal Company, which it owns. It also maintains a large freight and passenger organization in Jacksonville and division freight and passenger offices at Orlando, Fla., and Tampa, Fla., to solicit competitive traffic moving to and from Florida and points north of Jacksonville, Fla., Jesup, Ga., and Savannah, Ga.

The Southern insists that, if the Coast Line is permitted to merge the debtor's line and to wipe out the latter's identity, the Southern will then have only a limited opportunity to secure traffic from the debtor's line, even in view of the Coast Line's assurances that all present routes with the debtor will be maintained. If this were not so, the Southern contends, the Coast Line would have little reason to make the investment necessary to acquire the debtor's line. There is ample grounds for the belief, however, that Coast Line may be motivated to a considerable extent in protecting its existing interchange with the debtor, which amounts to more than 50 percent as to freight traffic and approaching 100 percent as to passenger travel, against the situation which could develop if the debtor's property should pass into adverse hands.

The Southern urges that the interchange traffic with the debtor which it would lose is not only of great importance to the Southern system generally, but especially in supporting the above-mentioned light traffic lines, the operation of which it considers in the public interest. The vice president of the Southern stated on cross-examination that there was no suggestion that any of the alleged light density lines would be abandoned in the event of the merger. Counsel for the Jacksonville Chamber of Commerce and Jacksonville Traffic Bureau also emphasizes the adverse effect which a merger would have on the Southern as well as on the Seaboard and upon the competitive situation now prevailing at Jacksonville particularly with respect to the movement of vegetables from the Lake Okeechobee section and water-rail competition through the port of Jacksonville.

The Southern at first supported the "Lynch plan," described in the report of January 8, 1945, in this proceeding, whereby the Coast Line would obtain control of the debtor through majority stock ownership. The Southern notified the Coast Line that it would not intervene in this proceeding. Thereafter, it decided to do so in opposition to the merger. The Coast Line asserts that it is not compatible with the public interest to permit the Southern to repudiate its commitment not to intervene, that the latter's interest is wholly selfish and that "the only

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effect of a unification would be that the Southern would have to work harder to hold the same gross revenues and might suffer some reduction in its earnings, essentially a private matter."

The Southern justifies its changed decision on the matter of intervention, as caused by a change in conditions occurring subsequent to its commitment not to intervene. It had meanwhile decided to continue its controlling interest in the Georgia, Southern & Florida Railway which had a $4,000,000 bond maturity on July 1, 1945, half of which was owned by the Southern, by making available funds to pay the other one-half. It also states that it had no knowledge of the Coast Line's intention of filing a plan of its own at the time of its commitment and that the Coast Line plan contemplates a merger which is quite different from the Lynch plan which would have maintained the identity of the debtor. The Coast Line intimates that Southern's intervention was the result of a trade with Ball, and the record supports such a conclusion. Between the date of reopening of the proceeding and Southern's intervention, Ball had conferences with the president and with the vice president of Southern, and stated to them that it would be to Southern's interest to intervene. Ball testified that later he suggested to St. Joe Paper Company that Southern be favored with additional traffic.

As to the allegation that its interest in this proceeding is wholly selfish, the Southern asserts that this is a "motive of self interest which is recognized as legitimate," citing *United States* v. *Illinois Central R. Co.*, 263 U. S. 515, 523. Southern's motive of self-interest may be legitimate, but has little bearing upon the public interest. The Southern seems to feel that the merger would enable the Coast Line to solicit more effectively on basis of better service, but this would obviously be in the public interest.

The Seaboard intervened in this proceeding prior to the oral argument in protest of the proposed merger of the debtor with the Coast Line, and on oral argument advanced substantially the same principal argument as the Southern. It asserts that the merger with the Coast Line will greatly increase the latter's power over routing of east coast traffic and thereby lessen the competition between the trunk lines, which would tend to lower the quality of service to east coast shippers. It also contends that the merger will result in a substantial loss of freight revenues of the Seaboard. What is said with respect to Southern's motive of self-interest and the public interest applies equally to Seaboard, especially since Seaboard already serves with its own rails probably the most productive section of the debtor's territory.

On basis of the record and the conclusions drawn therefrom, we find that the effect of a merger of the debtor's property with the Coast Line

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upon the revenues of the Southern and the Seaboard, if any, would not adversely affect the public interest.

Future financial stability of the debtor.—The Coast Line claims that the reorganized debtor would benefit from a merger with the Coast Line, as it would then be included in a strong company which could lend it adequate financial support in the future if necessary. In this connection, the Coast Line refers to the uncertainty, as stated in the report of January 8, 1945, which we believe will attend the debtor's future operations because of expected increased air and truck competition, the restricted and nonindustrial nature of the territory served and the rise in costs of materials and labor. The Coast Line expresses the opinion that the new first mortgage authorized by the approved plan will not be a reliable future financing medium, since $20,250,000 of bonds would be issued under it immediately upon reorganization.

The Coast Line believes that many residents on the east coast of Florida expect that the trustees of the Du Pont trust would come to the aid of an independently reorganized debtor but that such expectations are not justified, since the Du Pont trustees have made no direct commitments and, being trustees of a charitable trust, their duty is to safeguard the trust estate.

On the other hand, the St. Joe Company alleges that the Coast Line has offered no evidence of record that an independently reorganized debtor would not have assured financial stability, that the evidence shows that the inherent earning power of the debtor will not be increased by merger, that merger is not necessary to provide adequate coverage of fixed charges, that we have found that the contingent charges provided for by the approved plan will be adequately covered by the debtor's future earnings, and that it is unnecessary to assure future financing of the debtor's needs if it be reorganized without debt (other than equipment obligations) as urged by the St. Joe Company. Furthermore, the St. Joe Company alleges that the Coast Line is not in a position to insure payment of the debtor's fixed charges after reorganization, even if such assurance should prove necessary. It contends that the L & N stock owned by the Coast Line is a free asset which may be disposed of by the Coast Line at any time and, therefore, is not a proper basis upon which to predicate estimates of the amount of income available for fixed charges.

The modernization program of the Coast Line in recent years has been hereinbefore described. During the period 1928–45 the company also has reduced its debt, other than equipment obligations, from $148,572,930 to $83,514,700, a reduction of $65,058,230 or 43.79 percent, and during the same period has increased its investment in road and equipment by $50,212,466.

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During the period 1928–1945,[29] the Coast Line had a deficit after all charges in five of the years, 1932, 1933, 1934, 1935, and 1938. For the entire 18-year period, average net income per year amounted to $5,498,054. Had the recent reduction in indebtedness been in effect during the entire period and after deduction of L. & N. dividends received on stock sold by the Coast Line (the proceeds of which were used to reduce indebtedness as hereinbefore stated) and after one other minor adjustment, the average net income as so adjusted would have amounted to $7,145,247 per year and there would have been deficits after fixed charges in only 2 years, 1932 and 1935.

The L. & N. dividends have been a considerable item in the Coast Line's realization of net income, particularly in depression years. In 1944, these dividends amounted to $4,176,900, partly offset by interest of $1,400,000 on the Coast Line collateral bonds which the stock secured but which had not been retired. The difference of $2,776,900 represents part of the $16,101,393 total net income realized by the Coast Line in 1944. During the period 1928–45, the L. & N. stock has failed to pay dividends in only 2 years, 1932 and 1933, although the dividend rate has at times been less than the $7 per share (on the old stock) paid in recent years.

As hereinbefore shown, the Coast Line still owns 823,427 shares of the new 2-to-1 divided stock on which the current dividend rate is about $3.50 per share. This stock is unpledged.

A balance sheet of the Coast Line as of August 31, 1945, shows total investments of $322,213,986, including $61,381,603 of investments in affiliated companies, current assets of $81,516,796, including cash and temporary cash investments totaling $52,398,526, deferred assets of $2,304,562, unadjusted debits of $3,746,892, and total of all assets $409,782,236.

On the same date, liabilities consisted of capital stock (plus premiums and assessments thereon) $89,544,923; long-term debt $105,542,516, including $20,821,817 of equipment obligations; current liabilities $55,839,129, including accrued tax liability of $37,044,494, deferred liabilities $57,707, unadjusted credits $7,879,559, leaving a surplus of $150,918,402, of which $9,503,115 was unearned and $141,415,287 earned.

The debtor's average annual income available for fixed charges (as stated in the report of January 8, 1945) for the period 1936–40, inclusive, was $1,035,311. Under the previously approved plan, fixed interest would be negligible, consisting only of interest on equipment obligations, and contingent interest would amount to $911,250. The

[29] 1945 partly estimated.

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average normal year's earnings available for interest as found by the Commission in its report of January 8, 1945, is $1;500,000.

The above figures with respect to the debtor compare with average annual income of the Coast Line as hereinafter adjusted, available for fixed charges for the same period of $6,680,953. However, the Coast Line has present fixed charges of $4,099,493, leaving an average annual amount of $2,581,460, available for contingent interest, the amount of which is negligible, and for dividends. The Coast Line claims that its earnings for this period are not representative of its prospective earnings in the future because of the extensive improvement program embarked upon since then, which, it asserts, will result in economies of operation. However, the Coast Line has made no estimate of a normal future year's earnings for its system, a vice president testifying that he had no opinion as to what a normal year's earnings for the Coast Line would be, and that in preparing its plan the Coast Line had no estimate in mind.

For the year 1945 the Coast Line had railway operating revenues of $138,696,621 and railway operating expenses of $123,207,152 (operating ratio 88.83 percent), net revenue from railway operations $15,489,469, railway tax accurals $6,400,000, railway operating income $9,089,469, net railway operating income $5,447,059, other income $5,038,297, including dividend income of $3,458,025, income available for fixed charges $10,192,976, fixed charges $4,656,313, contingent interest $5,028, and net income $5,531,635. The relatively high operating ratio was due in part to operating expenses having included a charge of $23,477,496 for amortization of facilities and equipment necessary in the interest of national defense as provided in the tax laws, such charge including amortization referable to prior years, but recomputed in 1945 to the end of the emergency. Nonoperating income was very considerable and fixed charges plus contingent charges were earned 2.19 times.

For purposes of comparison, the debtor's income account filed by its trustees for the same year, 1945, shows railway operating revenues $29,571,007, railway operating expenses $20,574,937 (operating ratio 69.58 percent), net revenue from railway operations $8,996,070, and net railway operating income $4,401,728, other income $203,824, and income available for fixed charges $4,337,148. Under the previously approved plan its interest charges for the year would have been $939,800, all contingent except $28,550 fixed interest paid in 1945 on equipment obligations. These interest charges would have been covered 4.61 times.

The annual interest charges of the reorganized debtor under the plan previously approved would consist of a small amount of fixed

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interest, comprising entirely interest on equipment obligations, and $911,250 contingent interest on $20,250,000 of bonds maturing in 75 years. These bonds would be secured by a first mortgage.[21] We have found that the debtor should have earnings of $1,500,000 available in a normal year for payment of interest, none of which under the previously approved plan would be fixed interest except for a small amount payable on equipment-trust obligations. The same plan provides for the immediate setting aside of a large sum of cash, now in the hands of the debtor's trustees, to be devoted exclusively to the cost of a rehabilitation and modernization of the property. It also provides for an annual capital fund which would be available in the future to provide funds for payment of additions and betterments necessary from time to time.

The plan would further permit the issuance under the first mortgage of not exceeding $1,000,000 (or an amount equal to 2 years' fixed charges of the reorganized company, whichever shall be the greater) of emergency bonds bearing fixed or contingent interest and also fixed or contingent interest bearing bonds to refund series A bonds without prior approval by the holders of the series A bonds to be issued in the reorganization. It also permits, under certain conditions, the future issuance under the mortgage for specified purposes of an unlimited amount of additional bonds bearing either fixed or contingent interest.

Both mortgages covering the debtor's property provided for in the Coast Line plan would be closed mortgages and the principal of the bonds to be issued under them would be secured only by the property of the debtor.

Under the plan previously approved, which is based on an assumption of independent operation of the debtor's line, the capital structure for the reorganized company therein approved and the provisions for future issuance of additional securities adequately provided the means for future financing of the debtor's capital requirements on reasonable terms. However, we now conclude that a merger of the debtor with the Coast Line will provide a broader and stronger basis upon which new capital funds may be obtained. Certainly the Coast Line would necessarily be more "transportation minded"; looking to a continuation of maximum traffic from the debtor's territory, than

[21] The St. Joe Company has requested a modification of the plan previously approved by us to permit an option of conversion of these bonds into preferred stock, such issue of preferred stock to be authorized for that purpose alone. If a plan contemplating control of the debtor's line by the first and refunding bondholders should be approved by us, such a plan should contain this modification. If, as seems probable from the representations of the St. Joe Company, holders of a considerable amount of the bonds should exercise the option, the amount of indebtedness and interest charges of the reorganized company would be materially decreased.

would the St. Joe Company with it numerous interests and investments foreign to the transportation field.

The Coast Line has in its treasury at the present time a considerable principal amount of unissued bonds which will be available for sale in the future and which constitute parts of seasoned issues already outstanding. The Coast Line also asserts that bonds would be issuable in the future under the after-acquired property clauses of its existing mortgages to provide for future improvements and betterments to the debtor's property in the event of unification. In any event, under a merger of the two carriers, the financing of the future requirements of the debtor's line will be supported by the credit of a large trunk line having a reasonably successful history of earnings in the past. We find that a merger of the debtor with the Coast Line will be of appreciable benefit in assuring greater financial stability for the debtor.

Other considerations of public interest.—Under our tentative plan of consolidation of railroads of August 3, 1921,[22] the debtor's railroad was grouped with the Coast Line—L & N group. Professor William Z. Ripley, whose separate report and plan was attached as an appendix to our consolidation report, recommended, however, that it be maintained as an independently operated carrier since, in his opinion, "it would be a manifest injustice and a hardship to tie this property up to any single system." In our later report on a plan of consolidation issued December 9, 1929,[23] we neither adopted the previous tentative allocation of the debtor's line nor followed Professor Ripley's recommendation, but allocated the debtor to the Southern Railway system.

The Coast Line and Senator Pepper vigorously urge that future operation of the debtor by any powerful, private interest and particularly by the Du Pont trust, would be detrimental to the interests of the people of Florida. There is no doubt that the Du Pont trust has large investments and considerable influence in Florida. The extent and nature of these investments have been hereinbefore described. In support of its position, the Coast Line refers to our decision in *Piedmont & N. Ry. Co. Construction*, *supra*, hereinbefore discussed. Attention is called particularly to the part of Commissioner Eastman's concurring opinion, which has been previously quoted. In the decision in the above case, the Duke interests are described in detail. At the time of the report, they owned, controlled directly or indirectly, or had an influencing interest in 13 textile-manufacturing companies, the Piedmont & Northern Railway, several large power companies, many local public utilities, and had large in-

[22] *Consolidation of Railroads*, 63 I. C. C. 455.
[23] *Consolidation of Railroads*, 159 I. C. C. 522.

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terests in the R. J. Reynolds Tobacco Company and other tobacco companies, the Aluminum Company of America, and the Carolina Standard Gas Products Company.

The extent and nature of the Duke interests were not factors in the decision reached in the majority report of the Commission denying extension of the railroad, except as an inference may be drawn from the statement that the competitive nature of the proposed railroad extension "is aggravated by the association of the applicant with large interests which have the power to control or influence much traffic on other grounds than transportation service." The proposed extension of the Piedmont & Northern Railway would have been highly competitive with several parallel railroads all of which protested its construction on the grounds both of the unfair competition which would result from the influence of the Duke interests in obtaining traffic, and the absence of any necessity for the additional service. Commissioner Eastman in his separate expression emphasized the "evils of interrelation between transportation lines and industries which they serve."

In the present case, while the proposal does not contemplate construction of additional competing facilities, the circumstances with respect to the "evils of interrelation between transportation lines and the industries they serve" are not different. While the "interrelation" might not be a direct one in the sense that the interests of the Du Pont estate do not include manufacturing plants served by the debtor, the power of the Du Pont estate to influence shippers and others, as hereinafter described, makes the principle of the Piedmont case here applicable.

It appears from the record, however, that there would exist, if St. Joe Company were permitted to control the reorganized debtor, a measure of interrelation between that company and the industries it serves which we should consider. While the predominant interests of the Du Pont trust, other than the St. Joe Company, are in banking and real estate, the record justifies the conclusion that the St. Joe Company probably will be an important shipper or receiver of shipments of construction materials and will be interested in other incidental shipments. The broad interests of the Du Pont trust and the St. Joe Company in the State of Florida have been heretofore described briefly. A more detail description of some of these is important at this point.

As of December 31, 1944, the Du Pont estate owned 231,870 shares, or about 2.1 percent, of the common stock of E. I. du Pont de Nemours & Company, having an inventory value of $32,103,271. The Du Pont estate sold 10,000 of these shares in 1945. E. I. du Pont de Nemours &

Company owns 10,000,000 shares, or about 22.7 percent of the common stock of the General Motors Corporation. As of the same date, the Du Pont estate owned 9,917 shares of the common stock of General Motors Corporation, the inventory value being $487,792.

The Florida National Bank of Jacksonville, one of the banks controlled by the Du Pont estate, controls a warehouse which is conceded to be the largest in Florida, and which is used by more than 100 of the Nation's largest manufacturers for the storage of merchandise. Shipments are made to the warehouse company for distribution to a large number of consignees. As a rule the shippers owning the merchandise leave the routing of shipments out of the warehouse to the warehouse company expecting the latter to look out for their interests through use of the cheapest or best routes. The warehouse company terminal is located on the tracks of the Seaboard and the Southern.

The warehouse company assists in the claim adjustments between the shippers and the carriers, traces in-bound and out-bound shipments, requests placement of cars for out-bound solid shipments and has a great many tenants in its terminal, which it assists in transportation matters. Its shipments are so heavy that it delivers most of its merchandise to the carriers with its own trucks.

The same bank which controls the warehouse company has recently agreed to lend $1,500,000 to a transportation company to assist in financing a ferry service between Key West and Havana, Cuba.

It appears that the Florida National Bank & Trust Co. at Miami, Fla., controlled by the St. Joe Company, owns an 18- or 19-story office building in Miami, completely air-conditioned, and modern in every respect.

The paper business of the St. Joe Company is substantial. The plant at Port St. Joe, Fla., is carried on the books at a net after depreciation of over $5,000,000. Its incoming and outgoing traffic supplies more than half of the freight revenue of the Apalachicola, also controlled by the paper company. The St. Joe Company also owns approximately 470,000 acres of land in northwest Florida.

The St. Joe Company holds undisclosed investments in the St. Joseph Land and Development Company which owns tracts of cut-over timber and a number of miles of Gulf beach frontage, in Florida; in the St. Joseph Dock & Terminal Company which among other property owns a large steel dock on the Gulf of Mexico and a warehouse; in the St. Joseph Telephone & Telegraph Company which has 13,000 miles of telephone circuits; and in the Florida Building Company which holds contracts, notes receivable, and mortgages in numerous houses that it built at Port St. Joe.

The Apalachicola Properties, Inc., controlled by the Du Pont trust, owns property, mostly forest land and water frontage lying between the city of Apalachicola and Port St. Joe.

On the east coast of Florida, the St. Joe Company owns other property worth between 3 and 4 millions of dollars, located at Jacksonville, San Jose, Ponte Vedra, Palatka, Daytona Beach, Fort Pierce, West Palm Beach, and Miami, all apparently being held for development. Extensive properties also are owned by other Du Pont controlled companies. Ball and his associates or the St. Joe Company hold interests in, or own, five hotels located at various points in Forida.

Considering, along with the foregoing properties, the 14 banks controlled by the Du Pont trust and the 3 or more other banks in which it is heavily interested, the foregoing affords a fairly comprehensive picture of the breadth of the development which the Du Pont trust envisions in this State. And when it is recognized that these interests have purchased over 60 percent of the road bonds that have been refunded by the State Board of Administration, or that they have assisted in refunding well over 100 million dollars of the obligations of the political subdivisions of the State, the power and influence which they can assert is obvious. The substantial support for the St. Joe Company's program for control of the debtor evidenced at the hearings in these proceedings leaves no doubt that in one way or another, directly or indirectly, such influence is being exerted.

In view of the probable development of the controlled properties of these interests in Florida, it is reasonable to expect that they will become importantly interested in shipments of freight over the railroads of the State. While no violation of the letter or the spirit of the so-called commodities clause of the Interstate Commerce Act would necessarily result through St. Joe Company control of the reorganized debtor, nevertheless the Du Pont estate will be in a position, particularly because of its large banking interests, to influence a great number of shippers to route their shipments over any connecting carrier which, because of advantageous division arrangements or for other reasons of its own, it may wish to favor. In fact, its power to coerce its shippers would be much greater than that which the Coast Line would have in the event of a merger, and of which some of the shipper witnesses at the hearing were apprehensive.

We find that such opportunity given to a private institution of admittedly widespread power, presents a situation which might have grave consequences and against which it would be impossible adequately to protect the shipping public and the carriers with which the debtor's line connects, if control of the debtor is placed in the Du Pont

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estate. While a merger with the Coast Line would present a somewhat similar situation in that the Coast Line doubtless would attempt to retain its longest haul, its appeal to the shipping public would be based primarily on the quality of service it would furnish, and the requirements of traffic relationships between trunk-line carriers would prevent the abuse of its power, at least to the extent possible under Du Pont control of the debtor's line.

The St. Joe Company calls attention to what it refers to as the "pyramidic control," which it contends the Safe Deposit Company holds over the 11,000-mile Coast Line system. As previously stated, the Safe Deposit Company in various fiduciary capacities holds 59.9 percent of the stock of the Coast Line Company which we have found in turn controls the Coast Line within the meaning of the Interstate Commerce Act.[25] These intercorporate relationships and the extent of interlocking directorships and officers have already been described. The Coast Line denies that either the Safe Deposit Company or the Coast Line Company exercises actual control over it or in any way attempts to dictate or participate in any matters relating to the management of its railroad properties. However, the record establishes the fact and we find that the Safe Deposit Company possesses such control of the Coast Line that it may at any time exercise its power to dictate the policies, management, and operation of that carrier, if it desires so to do.

The St. Joe Company alleges that to add the debtor's property to the present "pyramidic" control held by the Safe Deposit Company, which represents an investment at present market values of only about $12,000,000, would mean a violation of the principles expressed by us in *Southwestern Lines Unification*, 124 I. C. C. 401,[26] in discussing the propriety of control by the Kansas City Southern Railway Company of the Missouri-Kansas-Texas Railroad Company, and through the latter, of the St. Louis Southwestern Railway Company. Furthermore, the St. Joe Company alleges that this control of the debtor

[25] *Atlantic Coast Line R. Co. Purchase, supra.*

[26] At pages 438–9, we said: "This seems too small a base upon which to build such a financial pyramid. Concentration of control within proper limits may be a necessary incident of the grouping of railroads into a limited number of systems. There is, however, a limit to the extent to which it properly may be carried. As we view it, that limit is reached before the concentration has progressed to the extent of 1 to 50. There are too many possibilities of the misuse of power lodged in the hands of a small group of stockholders whose financial interest in the enterprise may be very small in comparison with the enormous assets under their control. However worthy of trust the persons now seeking to acquire this control may be, their successors may not be so worthy. The possibilities of exploitation of the carrier and the use of its resources for the personal benefit of those controlling it is obviously increased as the disparity between the investment representing control and the aggregate assets controlled increases. One such situation and its consequences was considered by us in our report on *Financial Transactions C. R. I. & P. Ry. Co.*, 36 I. C. C. 43."

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would be obtained without further investment. In this connection it should be noted that the mortgages to be executed under the Coast Line plan of acquisition of the debtor's line would be divisional mortgages secured as to principal by the properties of the debtor alone. The new stock to be issued under the plan would be stock of the Coast Line but the new preferred stock would be nonvoting. The amount of cash, if any, which would be furnished by the Coast Line from its own treasury is in dispute and will be a subject of later discussion.

In view of the evidence that the Safe Deposit Company does not at this time actually exert any control over or management of the affairs of the Coast Line system, we cannot, on the present record, adopt the view that the Safe Deposit Company's power to do so, though coupled with a relatively small investment in the system properties, should be of importance in determining whether the Coast Line plan is compatible with the public interest.

Conclusions.—In the foregoing discussion we have found that specific betterments of service and economies of operation and an appreciable increase in financial stability of the reorganized debtor will result from a merger of the two carriers, and that experienced trunk-line operation of the debtor's line will be more in the general public interest, particularly from the viewpoint of providing an efficient national transportation system, than will independent operation under the control of a noncarrier corporation which lacks such experience, and whose interests will necessarily be directed most largely to matters other than transportation.

It is clear, from the evidence presented, that the St. Joe Company would be in a position, if it controlled the reorganized debtor, to so control its operations as to further its own interests and the other extensive Florida interests of the Du Pont estate to the ultimate disadvantage not only of the shippers and citizens of the State but to the detriment of the national transportation system as well. We find that adoption by the St. Joe Company of this attitude would inevitably have grave consequences from which it would be impossible to protect the shipping public and the connecting carriers.

As has been hereinbefore pointed out, the United States Supreme Court has defined the term "public interest" as requiring "appropriate provision and best use of transportation facilities," *New York Central Securities Corp.* v. *United States*, *supra*. We find from the record now before us that the best and most efficient use of the transportation facilities of the debtor's railroad will result from its operation by the Coast Line rather than by the St. Joe Company.

Upon consideration of the record of this proceeding, we find that there is a substantial preponderance of evidence that a merger of the

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debtor with the Coast Line will result in certain specific improvements in transportation service to the public and ultimate economies of operation, as compared with operation under control of the St. Joe Company; that an equitable adjustment of the problems of the present employees of the debtor in the event of a merger can be effected; and that the merger will promote the future financial stability of the debtor, and in general will insure a more adequate, economical, and efficient transportation service than will operation under the control of the St. Joe Company.

From all of the evidence, we find and conclude that a plan of reorganization of the debtor vesting control of the reorganized company in the St. Joe Company will not be compatible with the public interest, and that a plan vesting such control in the Coast Line will, if other provisions of the plan are fair and equitable and otherwise meet the requirements of section 77 of the Bankruptcy Act, be consistent and compatible with the public interest.

FAIRNESS OF THE COAST LINE PLAN

The principal provisions of the Coast Line plan have been heretofore described. Under the plan, cash would be distributed to the debtor's first and refunding mortgage bondholders on a basis of $133.33 per $1,000 bond, with an alternative offer of one-half that amount plus a pro rata disbursement of all "free cash" in the debtor's treasury as of December 31, 1945.

In its exceptions to the proposed report the Coast Line makes a still different offer as follows:

> All "free cash" as of the effective date shall be distributed to the holders of the Debtor's First and Refunding Mortgage Bonds.
>
> The amount of the "free cash" shall be determined by the Court on the basis of all assets classifiable as current assets, plus any amount in Account 704 which would be available on the consummation of the plan, less (1) all liabilities, whether or not reflected in the balance sheet as of the effective date, which are not to be discharged under the plan, (2) $000,000 for reorganization expenses, (3) $500,000 for cash working capital, (4) material and supplies of an amount to be determined by the Commission or the court, (5) and a reserve of an amount to be similarly determined for the rehabilitation and improvement program, less the net cash charged subsequent to December 31, 1945, either to capital or expenses, in connection with such program.

The purpose of this last offer, as stated by the Coast Line is to insure a contribution from its own treasury of at least $3,000,000 of cash.

Under the Coast Line offer, the amount of what is termed "free cash" in the debtor's treasury would be determined as of the effective date of the plan, which would be approximately the date of consummation,

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and would be determined according to a formula (modified as to the date of its application as above stated) introduced as an exhibit by the Coast Line, and used instead of the amount of actual cash on hand at the time. This amount of "net current assets" would be calculated upon a basis of the difference then existing between current assets (plus the amount of cash held in a special deposit representing cash held in lieu of mortgage property sold)[27] and current liabilities of the debtor after making various adjustments.

These adjustments in determining net current assets, and in the other deductions made in determining the amount of free cash, involve several disputed items, including the amount which should be eliminated from current assets for materials and supplies, the estimate of eventual liability of the debtor in accounts 727 and 778, and the propriety of deductions of amounts equal to the estimated deferred maintenance $963,100, normal additions and betterments $2,500,000, and extraordinary additions and betterments to be charged to operating expenses $2,683,251, incident to the debtor's improvement program for which a cash reserve is provided in the plan which we previously approved. S. A. Lynch, and others contend that the amount deducted for materials and supplies is excessive by $1,200,000, in view of the testimony of its expert witness that $2,000,000 is sufficient for this purpose and that the deductions for additions and betterments charged to operating expenses and for deferred maintenance are not proper, since most of the operating expense items incident thereto would be paid out of current earnings prior to the consummation of the plan.

The new securities per $1,000 first and refunding bond (and unpaid interest accrued to the effective date of the plan) offered under the Coast Line plan would comprise $200 principal amount of divisional first-mortgage fixed-interest 3½-percent bonds due 1971, $250 divisional second-mortgage 4¼-percent income bonds due 2021, $200, par amount, of new Coast Line $4-dividend nonvoting preferred stock, and $133.33 of the now outstanding Coast Line no-par-value common stock stated at $100 per share. The total principal amount of all new securities per $1,000 first and refunding bond is $783.33.

In view of the finding in our report of January 8, 1945, that the capitalization of the reorganized debtor should include no fixed-interest bonded indebtedness, the Coast Line plan provides an alternative offer of $450 of the 4½-percent divisional income bonds per $1,000 first

[27] At the hearings, the debtor estimated cash on hand as of December 31, 1945, at $25,384,202 with $693,184 additional held in the special deposit. The amount of cash actually on hand proved to be $26,151,575, and the amount in the special deposit $1,210,129. From this cash, the $12,000,000 principal amount of first-mortgage bonds would be paid.

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and refunding bond in lieu of the $200 of divisional first-mortgage and $250 of divisional income-mortgage bonds. The income bonds under the alternative offer would be identical with those under the original offer except that the mortgage securing them would be a first mortgage instead of second mortgage on the properties of the debtor.

Under the terms of the plan previously approved, each holder of $1,000 principal amount of first and refunding bonds would receive in exchange therefor, together with unpaid interest to January 1, 1946, $450 principal amount of new first-mortgage 75-year 4½-percent income bonds and $450 stated amount of common stock of no par value, plus any cash determined by the court to be distributable.

The capitalization pertaining to the debtor's property under the Coast Line plan according to both of the alternative offers (exclusive of equipment obligations) would be $35,250,000, with the no-par common stock stated at $100 per share, compared with $40,500,000 under the plan previously approved by us with the common stock having no par value, but also stated at $100 per share. The Coast Line offers, in addition, $3,000,000 in cash which it states will be payable out of its own funds.

Witnesses for the Coast Line testified that studies made by them on several different bases convince them that the new securities offered by the Coast Line would be of greater value than that provided for under the plan approved by us. Their opinions were based on the support which the Coast Line credit would afford the new securities, the earnings of that system (both operating and nonoperating income), its dividend record, the savings which they assert would result from a merger of the two carriers, and the alleged proportionately greater share of the combined earnings of the two companies which the debtor's creditors would obtain, as compared to the contribution which would be made by the debtor's line to such earnings.

Of the parties expressing opinions on the specific terms of the offers of new securities under the Coast Line plan, the terms of that plan with some qualifications as to the amount of cash distribution are advocated by the 5-percent committee,[28] holder of about $778,000 of the first and refunding bonds, and one individual bondholder, Lorenzo C. Dilks, owning about $5,000 of the bonds. The committee's advocacy of the plan is based principally upon a belief that it is substantially more favorable to the first and refunding bondholders than any plan yet submitted.

[28] It is not clear that the 5-percent committee would advocate the Coast Line plan if the alternative offer of all income bonds in lieu of part fixed-interest bonds should be adopted.

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The terms of the Coast Line plan are opposed by the St. Joe Company, S. A. Lynch, and others, owning or controlling about $3,000,500 of the first and refunding bonds; E. N. Claughton and 4 asssociates together holding or controlling $4,643,000 of the bonds; F. K. Conn, owning $400,000 of the first and refunding bonds, $120,000 of the first-mortgage bonds and controlling $609,000 additional first and refunding bonds held by 10 other owners; and Charles B. Quarles owner of $5,000 of the latter bonds and holding powers of attorney executed by owners of $598,000 additional of the bonds. A witness for Alleghany Corporation, owner of $899,000 of the bonds, testified at the hearing in favor of independent operation. Some of the other individual first and refunding mortgage bondholders testified at the further hearing that they would prefer to receive securities of an independently reorganized company.

A considerable income, currently about $2,880,000 per year, is normally derived by the Coast Line from dividends on the stock which it owns of the L. & N. There is no assurance, however, that these shares of stock, constituting an unpledged asset of the Coast Line, may not be sold in the future, if the Coast Line so desires. Consideration of the sufficiency of the support for the new securities offered by the Coast Line in the event of merger should depend primarily on the operating results of the Coast Line. The present capitalization with a decreased indebtedness, and the modernization program which is well on its way to completion, should favorably affect further earnings.

The average annual earnings (including dividend income) of the Coast Line available for fixed charges for the 5-year period 1936–40, inclusive, when adjusted by elimination of dividends received during that period on the shares of its L. & N. stock sold in 1945, and by the addition of dividends paid by the Coast Line on Atlanta, Birmingham and Coast preferred stock (redeemed in 1945) were $6,680,953. Its present annual fixed and contingent charges are $4,099,493. Adding to the adjusted Coast Line average annual earnings available for fixed charges for this period those of the debtor for the same period, $1,035,311,[29] produces a total of $7,716,264.

Under the original proposal in the Coast Line plan, these earnings would produce the following annual return on the securities receivable in the reorganization by each holder of a $1,000 first and refunding bond of the debtor (allowing approximately $45,000 for interest on the debtor's equipment obligations outstanding as of December 31, 1945):

[29] The debtor's earnings available for fixed charges for 1936–40 which are used, are those stated in the report of January 8, 1945, and represent some adjustments of the earnings as reported to us by the debtor.

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On $200, fixed-interest 3½-percent divisional first-mortgage bonds	$7.00
On $250, income 4¼-percent divisional second-mortgage bonds	10.62
On $200, $4 per year preferred stock	8.00
On $133.33 common stock (at $100 per share)	3.70
Total	29.32

Under the alternative Coast Line proposal the annual return per $1,000 first and refunding bond of the debtor would be:

On $450, income 4¼-percent divisional second-mortgage bonds	$19.13
On $200, $4-per year preferred stock	8.00
On $133.33 common stock (at $100 per share)	3.60
Total	30.73

If the debtor were separately reorganized with the issue of new securities proposed under the plan previously approved by us, and the debtor's average annual earnings available for fixed charges for the period 1936–40 were realized, each holder of $1,000 of existing first and refunding bonds of the debtor would receive the following annual return, after deduction of about $45,000 interest on equipment obligations oustanding as of December 31, 1945.

On $450, 4½-percent income first-mortgage bonds	$20.25
On 4½ shares of no-par common stock (earned 39 cents per share)	1.76
Total	22.01

If the debtor were to realize the estimated future year income of $1,500,000 available for fixed charges, the amount of annual income on new securities receivable in an independent reorganization under the plan previously approved would be increased, provided all earnings were distributed, from the above $22.01 to $32.31, since earnings per common share would be increased from 39 cents per share to $2.68 per share.

On the other hand, the annual income per $1,000 of the debtor's first and refunding bonds under the Coast Line's original proposal, if this greater annual income of the debtor were added to the Coast Line's average annual earnings for 1936–40, would only be increased to $30.02 and under its alternative proposal to $31.43.

In this last comparison, the Coast Line's 1936–40 average adjusted earnings are used, while with respect to the debtor, its "normal year" estimate is used. Such a comparison, the Coast Line contends is unfair, since, in the case of the debtor, the "normal year" estimate considerably exceeds its 1936–40 average annual earnings. However, as hereinbefore stated, a witness for the Coast Line refused at the hearing to state what in his opinion a normal year's earnings of the

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Coast Line would be, and stated that the company had made no such estimate. The record is inadequate to enable us to make any estimate.

In the absence of any such evidence, it appears that the Coast Line's 1936–40 average is the only one available for use as representing a normal year in the future for that carrier. However, the progress made by the Coast Line toward completion of its improvement program should result in economies of operation and stimulation of traffic in the future not present during the 1936–40 period.

The Coast Line plan contemplates the issuance to the debtor's present bondholders of the same principal amount of interest-bearing securities as does the plan previously approved by us, and a smaller amount of stock, of which 60 percent is limited to 4-percent per year dividends. It is evident, therefore, that in prosperous years the Coast Line's earnings available for interest and dividends must increase at a higher rate than those of the debtor, in order that the Coast Line plan may yield as large a return to the debtor's present bondholders as they would receive under the plan previously approved by us. The experience of the two carriers in the war years as compared to the years immediately prior thereto indicates that the opposite is true.

The conclusion is obvious that in periods of moderate prosperity for the debtor (and especially so in years of very large earnings), the existing first and refunding bondholders would receive a greater return on the new securities allocable under the previously approved plan for independent operation than under the Coast Line plan, while in periods of low earnings the annual return would be greater under the merged operation, providing the combined earnings of the merged companies were sufficient to cover the dividend on the preferred stock offered under the Coast Line plan to the debtor's first and refunding bondholders. This in effect is conceded by the 5-percent committee which advocates approval of the Coast Line plan. This committee contends, however, that the Commission cannot logically assume earnings of the debtor in the future in excess of the "normal year" estimate of $1,500,000. This position of the committee is unwarranted. There is no assumption that in certain years the normal year estimate may not be greatly exceeded although not fully realized in other years.

The voting power of the present first and refunding bondholders of the debtor in the merged company would be insignificant under the Coast Line plan, particularly since the new Coast Line preferred stock, which they would be offered in the reorganization, would be without voting power.

It is important also to note that, under the plan originally proposed by the Coast Line, the interest receivable by the debtor's present bond-

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holders on the income bonds allocable to them in the reorganization and constituting more than one-half of all the bonds which they would receive, would be subordinated in payment to the Coast Line's annual interest amounting to over $4,000,000 on its now outstanding bonded indebtedness. Under the alternative Coast Line plan, all interest received by the debtor's creditors on the income bonds which they would receive in the reorganization would be so subordinated.

The Coast Line refers to the $3,000,000 of cash additional to that receivable under the plan previously approved, which the first and refunding bondholders would receive under the Coast Line plan, as support for its claim that its offer is more advantageous to the bondholders than the previously approved plan. The St. Joe Company contends that actually the Coast Line will not pay this additional amount of cash out of its own funds since it will take over all the debtor's cash and other assets, including material and supplies, as of the effective date of the plan and merely assume payment of the improvement program and the other requirements of the reorganization. It is true that the amount of cash in the debtor's treasury, as of the date of consummation of the plan, in all probability will be of sufficient amount so that the Coast Line will not be required to advance any cash of its own to meet the requirements of the reorganization until such times in the future as the cost of completion of the rehabilitation program for the debtor may then require such payments of additional cash.

However, if the approved plan requires cash in an amount equal to the estimated cost of the program, to be carried in a reserve fund by the Coast Line, and to be all mandatorily and exclusively devoted to the expense of the projects specified (and if more than sufficient for such purposes to additional improvements and betterments to the debtor's property), we find that the result will be that the Coast Line would be required to make any additional cash payment required by the plan out of its own available cash.

Nevertheless, we find that this cash contribution is not sufficient recompense for the otherwise inequitable treatment as above shown, which the debtor's first and refunding bondholders would receive under the terms of the Coast Line plan in return for all the rights which they would surrender under the terms of that plan.

The Coast Line also introduced in evidence certain statements purporting to show that the present market value of the securities offered under its plan is greater than the value of the securities offered under the plan previously approved by us. The unreliability or, at least, the inconclusiveness of such studies is apparent when it is realized that any estimates of the market values of the new securities to be

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issued under either plan, and particularly the approved plan, are necessarily a matter of the greatest speculation, and that the market value of the Coast Line common stock, some of which would be offered to the debtor's bondholders under the Coast Line plan, has greatly decreased since the studies were made.

We find and conclude that the Coast Line has not shown that its proposals for satisfaction of the claim of the debtor's first and refunding bondholders are fair and equitable, or afford due recognition of the rights which they would be required to surrender, or constitute an equitable equivalent of the value of their present securities.

We find, however, that, with certain modifications hereinafter specified, the Coast Line plan will meet the above requirements and, in view of our previous recommended finding herein that future control and management of the debtor's railroad will be, and that control and management by the St. Joe Company will not be, in the public interest, we find that the Coast Line plan as so modified should be approved.

Before discussing these recommended modifications, certain matters not directly affected by the question of future control of the reorganized debtor will be considered.

EFFECTIVE DATE

The St. Joe Company requests that the effective date of the plan be the date of consummation of the plan, and S. A. Lynch, and others, urge that the fixing of the effective date be left to determination by the reorganization managers with the requirement that it be approximately the date of consummation, and in any event not earlier than 6 months prior thereto. The date of consummation cannot be predicated at this time. It is asserted on brief by S. A. Lynch, and others, that there is a possibility of a ruling in the future by the Treasury Department that interest accruing on the old bonds of the debtor between the effective date and consummation date is not deductible by the debtor in its income tax return. However, such a possibility is contrary to the current practice of the Bureau of Internal Revenue as shown by its Cumulative Bulletin 1944–1 C. B., p. 101. There appears to be no good reason in this case why the effective date should not coincide approximately with the consummation date. Since, however, it may be advisable that the effective date be somewhat prior to the day of actual consummation of the plan, we find, as suggested by S. A. Lynch, and others, that the fixing of the effective date shall be left to determination by the reorganization managers, provided, however, that it shall be approximately the date of consummation of the plan and in no event earlier than 6 months prior thereto.

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PROPOSALS AND CONCLUSIONS WITH RESPECT TO AN INCREASE IN VALUATION OF THE DEBTOR'S PROPERTY

In our second supplemental report of January 8, 1945, we reviewed the debtor's earnings available for payment of fixed charges, from 1916 through 1943 and for the first 6 months of 1944. We also referred to the various estimates of prospective earnings available for fixed charges in a normal year, including the trustees' estimate of $1,268,000, which was presented at the first hearing in 1940 in this proceeding, estimates by the Du Pont estate presented at the same time, and a later estimate of $2,363,000 (before Federal income and excess profit taxes) by an expert witness, Kennedy, of the firm of Coverdale & Colpitts, engineers, who testified for S. A. Lynch, and others, at the reopened hearings in May 1944.

Upon the record to the date of the report of January 8, 1945, we found that $1,500,000 represented a fair estimate, so far as we could foresee at that time, of the debtor's probable future annual income available for payment of interest in a normal year, assuming completion of the program of extraordinary additions and betterments.

Since the issuance of the report of January 8, 1945, the record has been supplemented by income statements of the debtor for the entire years 1944 and 1945 and for the first 9 months of 1946.

For the years 1944 and 1945, the results were as follows:

	1944	1945	Increase or decrease
Railway operating revenues	$31,730,202	$29,571,007	$2,159,195 (decrease).
Railway operating expenses	19,055,811	20,574,937	1,519,126 (increase).
Income available for fixed charges	5,835,252	4,337,148	1,498,104 (decrease).

Following are comparative operating results for the first 9 months of 1946 and 1945:

	January-September inclusive 1946	January-September inclusive 1945	Increase or decrease
Railway operating revenues	$19,506,998	$23,006,026	$3,499,028 (decrease).
Railway operating expenses	15,364,646	14,649,051	715,595 (increase).
Net railway operating income	1,897,044	3,804,752	1,907,708 (decrease).

At the further hearing in November 1945, witness W. A. Gordon, also a member of the firm of Coverdale & Colpitts, testified further for S. A. Lynch, and others, and submitted a revised "estimated income for a prospective future year," of $1,947,000 available for fixed charges before Federal income and excess profits taxes. His estimate, based on the same amount, $12,550,000, of railway operating revenues used

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by Kennedy at the former hearing, is predicated on the theory that reductions in operating expenses, including rentals and taxes, other than income taxes, usually approximate 50 percent of any decrease in revenues. In the case of this debtor, there was a decrease approximating $19,180,000 from the operating revenues of 1944 to the $12,550,000 used by him for a future year. As shown in the above tables, the actual experience of the debtor for the limited period of 1944–45 and first 9 months of 1946 does not bear out this assumption, although the witness pointed out that there is usually a considerable "lag" in any decrease in expenses after revenues begin to decline.

Since the report of January 8, 1945, wages and costs of materials have risen while the operating revenues of the debtor are declining. We find, however, that the decline in operating revenues of this carrier will be at least partially overcome by the general rate increases which we have recently authorized.

In our report of January 8, 1945, we stated fully the uncertainties, which, in our opinion, will attend the future operating experience of this debtor. S. A. Lynch, and others, contend that our estimate of a future normal year income does not take into consideration recent basically changed conditions which in the future will permanently and favorably affect the debtor's earnings. These are the improvements to the debtor's property made since the date of our estimate, the modernization of the debtor's passenger service, and the growth of the territory served, particularly as to agricultural products. Our determination of an amount of $1,500,000 of normal year earnings made in our report of January 8, 1945, was based upon a record which was supplemented by hearings held by us in May 1944. At that time there was before us the debtor's entire rehabilitation program, which coincides with that now proposed, testimony of experts as to the expected economies resulting therefrom and evidence of the greatly increased income of the debtor through the first 6 months of 1944 (with an estimate by the trustees of the entire 1944 operating results). In our report of January 8, 1945, we carefully considered all these factors and decided to increase our previous estimate of $1,268,000 to $1,500,000.

It is noted that the expert who testified for the Lynch interests at the reopened hearings in November 1945 used the same total operating revenues in his normal year forecast as another member of his engineering firm used at the hearings in 1944. Counsel for the Lynch group state, however, that they lacked time to prepare a revised estimate and believe that the record is deficient with respect to evidence of the changed conditions, a conclusion in which we do not concur.

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We find that the record does not justify any increase in our estimate of future normal year income, which is based on the assumption of completion of the rehabilitation and improvement program and after consideration of the economies of operation that may reasonably be expected to result therefrom.

S. A. Lynch, and others propose a total capitalization for the reorganized company of $50,616,000, which includes the assumption of $2,616,000 of equipment obligations. The capitalization provided for in the plan previously approved by us on a comparable basis as to the amount of equipment obligations to be assumed, is $43,116,000. In view of the prospective earning capacity of the debtor as before described, there is no justification for any increase in this capitalization for the debtor as an independently operated company, and our previous finding is affirmed.[30]

MANDATORY DISTRIBUTION OF AVAILABLE CASH

The previously approved plan provides that distribution of cash in the treasury of the debtor to the holders of the debtor's first and refunding bonds, if made pursuant to order entered by the court prior to the effective date of the plan, shall be deemed to constitute part satisfaction of the claims of such bondholders additional to the treatment accorded them by the plan. It further provides that any such cash distributions, if made pursuant to order of the court entered on or subsequent to the effective date of the plan shall be applied, first, to payment of interest on the new first-mortgage bonds accrued since the effective date and, second, to decrease the total principal amount of new first-mortgage bonds otherwise issuable under the plan to holders of the debtor's first and refunding bonds.

S. A. Lynch, and others, urge that provision be made in the plan for a mandatory distribution on date of consummation of the plan to the first and refunding bondholders of all cash on hand at such date in excess of any cash reserved pursuant to the provisions thereof, such

[30] Contrary to the views expressed by certain counsel, the capitalization approved in the report of January 8, 1945, constitutes an appreciable increase over that previously approved. The plan approved on April 6, 1942, contemplated capitalization of only $35,008,000, plus equipment obligations of $1,992,000, of which $1,800,000 were for purchase of Diesel-electric locomotives under the program then in view. Otherwise, the program at that time contemplated expenditures of only $2,475,000 chargeable to capital accounts, of which 75 percent, or $1,856,000 could be funded under the mortgage provisions into first-mortgage bonds, making a total of $36,864,000 of securities issuable under the plan and for contemplated improvements, or $38,214,000 of total capitalization, assuming 75 percent of the cost of equipment to be funded.

The plan approved on January 8, 1945, contemplated a capitalization of $40,500,000 plus $666,000 of equipment obligations outstanding on that date. In addition, the program, as at that time calculated, contemplated the expenditure of $4,929,215 for new equipment, of which at least $3,697,000 would be funded into equipment obligations, making a total capitalization of over $44,000,000.

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distribution to be made prior to actual consummation. The 5-percent committee states that while it believes that the plan should provide for a mandatory distribution of available cash, it does not urge such provision if there be no excessive amount of cash reserved.

In our report of January 8, 1945, we stated that while we could specify the distribution of cash in excess of that reserved, we recognized that, under present conditions, there may be substantial changes in the debtor's cash balances from time to time prior to the consummation of the plan, and that we also recognized the possibility that we had underestimated the cost of the contemplated improvement and rehabilitation program and other cash requirements upon reorganization and the amount of cash which should be reserved therefor. For these reasons, we believed that it would be to the interest of all concerned, to leave the matter to the discretion of the court, which in reaching its decision would have the benefit of a knowledge of the conditions prevailing at the time.

S. A. Lynch, and others, also contend that this is a matter that should not be left to the discretion of either the reorganization managers or the court, and that we should prescribe a definite formula by which the amount of cash distribution would be determined at the time of consummation of the plan.

We find, in view of the conclusion herein that a plan should be approved providing for a merger of the debtor's property with the Coast Line, the approved plan should provide for a mandatory distribution to the debtor's first and refunding bondholders at the time of consummation of the plan of all excess cash not necessary to be reserved for the purposes hereinafter specified, the amount of such distributable cash to be determined as of the date of consummation of the plan in the manner specified in the following section of this report dealing with the establishment of cash reserves.

CASH RESERVES

The time elapsed since the issuance of the report of January 8, 1945, during which there has been accomplished part of the rehabilitation and improvement program in payment for which $8,700,000 of cash was reserved in the approved plan, together with an increase in the amount of cash on hand in the debtor's treasury makes necessary a revised analysis of the debtor's cash requirements and cash available in the reorganization.

Several of the parties urge that a determination of cash available should be based upon net current assets, which they define as the difference between current assets and current liabilities at the date of determination rather than upon the difference between the amount of cash

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(plus temporary investments of cash) actually on hand at the time. A comparison of the results which would be obtained by use of the two methods as of December 31 of each of the years 1941–45 is shown by the following table:

Period	Cash plus temporary cash investments	Current assets less current liabilities
Year 1941	$2,360,873	$2,894,473
Year 1942	6,772,100	6,817,778
Year 1943	21,225,544	16,661,706
Year 1944	28,370,533	21,907,778
Year 1945	27,324,091	26,352,982

It will be seen that the cash, plus temporary investments of cash, exceeded the net current assets at the end of each year, except 1941. As of December 31, 1945, the difference is not very marked. The parties advocating the use of the net-current-assets method urge that it will more truly represent the current position of the debtor, since the cash on hand is liable to have sudden fluctuations not indicative of the actual current position at a given time. There is force to this contention and for the present purpose we will adopt this method. Two adjustments should be made, however, in determining net working capital as of December 31, 1945, first, a deduction from net current assets of an amount of $110,000, described by the trustees of the debtor as representing the net effect of current items included in unadjusted debits and credits, and the addition of $1,210,129 in account 704, "Capital and Other Reserve Funds," representing a special deposit of cash in lieu of mortgaged property sold which, upon satisfaction of the debtor's first mortgage would be payable to the trustee under the first and refunding mortgage for the benefit of those bondholders. As so adjusted, net working capital as of December 31, 1945, amounted to $27,453,111. This amount is after provision for unsettled taxes in the amount of $1,366,483 as of that date. In the approved plan, $869,816 of cash was included in the total cash reserve of $8,700,000 to provide for settlement of such taxes. From this $27,453,111 as of December 31, 1945, should first be paid the principal amount of $12,000,000 (as of that date) of the debtor's first mortgage bonds outstanding plus accrued interest to date of such payment.[21]

[21] The court by order entered December 14, 1945, directed the trustees of the debtor to purchase any or all first-mortgage bonds which may be tendered to the trustees at a price of par plus interest to date of payment, the bonds to be purchased for the account of and in the interest of the first and refunding bondholders and to be kept alive and held by the trustees under an express trust for the pro rata benefit of the first and refunding bondholders without diminution of the rights of said securities. The first and refunding bondholders are, by the order, subrogated to the extent of their respective pro rata interests in said funds to all the rights and interests of the first-mortgage bonds so purchased, and the

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It is clear from the record that in the next 4 years after 1945 the rehabilitation and improvement program should be completed, except for payment of annual equipment-purchase installments. As to such installments, depreciation accruals during the succeeding years after the 4-year period will exceed the amounts of the payments. Therefore, in determining the amount of cash reserve, a 4-year period commencing January 1, 1946, will be used and the estimated cost of the rehabilitation and improvement program, as furnished by the debtor's trustees, contemplates its completion during that period. These costs have been recomputed since the approved plan was issued and effect given to the higher costs of material and labor expected to be prevailing in the later period.

This program, according to the trustees' exhibit, comprises $6,074,000 for cost of rail which is offset by $2,071,000 for salvage of old rail, making a net cost of $4,003,000; cost of bridges $600,000, stations and terminals $2,450,000, shop machinery $187,500, and other items $963,100. Thus total cash needed for the entire program is $8,203,600. Additionally the estimated cost of the Fort Pierce cut-off is $1,170,000 [12] equipment maturities and cash payments on equipment to be purchased during the period $2,432,501, cost of ordinary additions and betterments $1,000,000, reorganization expenses $600,000, cash working capital $500,000, and payment of first-mortgage bonds $12,000,000.

As to the amount of material and supplies required by the reorganized company on reorganization, the Coast Line estimates the amount at $3,200,000 and an expert witness for S. A. Lynch, and others, at $2,000,000. The general storekeeper for the trustees of the debtor testified that $2,000,000 might be considered a minimum based on traffic of the prewar level and $3,200,000 as a maximum which the debtor carried in 1945, a year of unusually high earnings. We conclude that $2,600,000 is a fair estimate of the amount that should be available upon reorganization.

The total of all these deductions is $28,506,101 against which depreciation accruals of $4,780,550 should be credited, the total net deductions thus being $23,725,551. The subtraction of this amount from adjusted net working capital of $27,453,111 leaves $3,727,560.

The above calculation includes the entire estimated cost of the rehabilitation and improvement program, both the amount charged

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first-mortgage bonds so purchased (with coupons attached thereto) shall be entitled to the same rights and shall be given the same treatment in any plan of reorganization as other first-mortgage bonds not acquired, are accorded in the plan.

[12] Certain of the parties contend that this amount should be reduced by $65,000 representing the cost of cross ties which to that extent is already included in material and supply account. If this reduction is made the "net working capital" should be reduced by the same amount so that the net effect would be the same.

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to capital account and that charged to operating expense (except depreciation charges). S. A. Lynch, and others contend that the charges to operating expenses should not be included, since, to a great extent, they will be incurred and paid for out of operating expenses prior to consummation of the plan. This will be true if the earnings from operations of the debtor's property during the next 4 years are sufficient to cover such greatly increased operating expenses. In view of the uncertain features previously recited herein, we find that there is no assurance of this. However, we find that, to the extent that the estimated cost of normal additions and betterments is included in the program, the cash reserve should be reduced to that extent. This latter provision will eliminate $250,000 per year for the next 4 years or a total of $1,000,000, and will leave a balance of $4,727,560 of cash remaining instead of the $3,727,560 above stated. Otherwise the reserve to be established by the reorganization managers should include the entire cost of the program to the extent not completed at the time of consummation of the plan.

One of the debtor's trustees pointed out the contemplated acquisition by the railroads from the Pullman Company of the latter company's equipment now used by the railroads. He stated that the debtor's share of the purchase price of this equipment would be approximately $312,000. While this amount might be considered as a possible item for which cash should be reserved, its payment is not of sufficient certainty, and the amount is not sufficiently large to warrant its inclusion in the reserve fund, particularly since the annual charges to rental of equipment income account would be decreased by such acquisition of the equipment. To summarize, we find that the cash reserve should be of the amount and for payment of items as follows:

Rehabilitation and improvement program and other cash reserve upon reorganization

Equipment maturities and cash payments on purchase of equipment	$2,432,501	
Other costs	8,203,600	
	10,636,101	
Less depreciation accruals	4,780,550	
	5,855,551	$5,855,551
Construction of Fort Pierce cut-off		1,170,000
Reorganization expenses		600,000
Cash working capital		500,000
Material and supplies		2,600,000
		10,725,551

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After payment in cash of the $12,000,000 of outstanding first-mortgage bonds this would leave as above stated $4,727,560 net working capital based on the net working capital existing as of December 31, 1945.

All the parties are of the opinion that an amount of $3,438,370 of cash should be reserved in a separate fund to provide for payment of that amount of additional liability for Federal income taxes for the years 1942–45 in the event that the debtor's deductions for accrual of "penalty interest" on its first and refunding bonds shall be disallowed. That question now appears to have been finally determined adversely to the position taken by the debtor.[33] The parties all believe, however, that the approved plan should provide that, if this amount shall not be required to be paid or if any part thereof shall be unnecessary, any of the reserve not so required shall be distributed to the existing first and refunding bondholders at the time of final determination whether before or after consummation of the plan.

The most practicable manner of providing for such a reserve seems to be that suggested by S. A. Lynch, and others, as follows:

> Provision should also be made for creation of a reserve for contingent tax liability of $3,438,370. No contingent tax reserve shall be created if the tax liability shall have been finally determined and paid prior to consummation of the plan or if it shall have been determined that there is no tax liability. If the tax liability shall have been determined to be a smaller amount, but shall not have been paid prior to consummation, the reserve shall be such smaller amount. If the tax liability shall not have been finally determined at consummation date, first and refunding bondholders shall receive, in addition to the other distribution made to them upon consummation, evidences of their right to receive a pro rata distribution of the portion of the reserve, if any, not required to be paid in final satisfaction of any tax liability, such distribution to be made immediately following the final determination that the tax liability is less than the reserve. Subject to the foregoing, the reorganization managers shall have authority to determine the form in which the first and refunding bondholders' rights to such distribution shall be evidenced.

We find that the approved plan should include a provision substantially as above.

From all the foregoing it will be seen that, based on net current assets as of December 31, 1945, without estimation of further increase or decrease in excess cash at date of consummation of the plan, the balance of cash remaining which could be distributed to the first and refunding bondholders in part satisfaction of their claim would amount to $1,289,190. This amount does not include any additional

[33] On this question see *Vanston Bondholders Prot. Com.* v. *Green* (December 9, 1946), 91 Law Ed. 175; and *Fleming* v. *Traphagen* (December 16, 1946), 91 Law Ed. 239.

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which may accumulate subsequent to the above date, nor is it
usted for the purchase by the trustees of the debtor, prior to con-
mation of the plan, of any of the debtor's outstanding first-mort-
ge bonds nor for any diminution as of the date of consummation of
plan in the amount of the cash reserve for rehabilitation and im-
provement of the debtor's property, resulting from the crediting to
h reserve of amounts expended for such purposes prior to such date.

TREATMENT OF UNSECURED CLAIMS

As hereinbefore stated, the Coast Line, holder by assignment of
,900,000, principal amount of unsecured claims against the debtor,
nd the trustee of the debtor's disaffirmed equipment-trust series D
rtificates, holder of an unsecured claim of $487,418.32 against the
ebtor, also hereinbefore described, contend that free unpledged assets
f the debtor are sufficient to warrant a payment in cash upon reor-
anization to all holders of unsecured claims.

In our report accompanying the approved plan, we affirmed a find-
ng in connection with former approval of the plan that even if such
ssets were found to be not subject to the liens of the debtor's mort-
ages, their value would be small and impracticable of distribution to
olders of unsecured claims, in view of the large amount of such
laims. For that reason, we found that the equity of the holders of
unsecured claims not entitled to priority over the mortgages was
without value and that such creditors should not be permitted to par-
ticipate in the plan of reorganization. Other than by a brief filed by
one unsecured creditor, holding a small claim, this finding was uncon-
tested until the Coast Line advanced its contention at the reopened
hearing in November 1945. Subsequently, on brief, the series D equip-
ment trustee made its similar request for modification of the approved
plan.

The trustees of the debtor introduced at the reopened hearing a
statement of general unsecured claims (not including the deficiency
claim of the first and refunding bondholders) filed with the trustees
pursuant to order of the court of June 6, 1941. These claims are as
follows:

Principal amount, open account indebtedness to Flagler Estate (assigned to Coast Line)	$400,000.00
Principal amount, open account indebtedness to Florida East Coast Ferry Company (assigned to Coast Line)	1,500,000.00
Principal amount of deficiency judgment on series D equipment trust	487,418.32
Tort claims	16,501.00
Other claims	131,987.71
Total	2,535,907.03

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The debtor's trustees at the reopened hearing introduced a "statement of assets of unadjudicated status as to being free from liens," as of November 13, 1945. These assets, the dates upon which the items were acquired, their book values, were stated, and their present values as estimated by the debtor's trustees are as follows:

Real estate	Date acquired	Book value	Present estimated value
1. Parcels at East Palatka, Putnam County, Fla.	September 29, 1920		$250.00
2. Parcel Denson Junction, Volusia County, Fla.	February 15, 1911		75.00
3. Acreage in West Martin County, Fla.	January 21, 1924		4,000.00
Stocks			
4. 2,960 shares $100 par value common stock Fruit Growers Express Company.	February 1920 to January 1945.	$118,600.00	296,000.00
5. Railway Express Agency, Incorporated 6 shares common no-par stock.	February 1929	600.00	600.00
6. The Peninsular & Occidental Steamship Company 7,497 shares $100 par value common stock.	August 1907	556,823.86	none
7. U. S. Sugar Corporation 160 shares preferred stock no-par value and 3 shares common stock.	June 5, 1934	22,035.72	12,821.00
Bonds			
8. The Peninsular & Occidental Steamship Company $1,352,000 first preferred mortgage 6 percent (reduced to 4 percent) series B bonds, due 1962.	June 7, 1932	602,001.00	614,047.00
Advances			
9. Advances by debtor to Railway Express Agency, Incorporated.	July 1929 to August 1931	22,999.02	22,999.02
10. Interest on above advances to Railway Express Agency, Incorporated.	August 31, 1945		287.49
Miscellaneous			
11. Other deferred assets—city of Fort Pierce, Fla. certificates of indebtedness dated June 1, 1931.	August 1931		2,892.96
12. Meter deposits with various towns	Prior to March 1931		69.50
13. Scripright to enter on certain land	June 1909	959.77	Unknown
Do	July 1910	230.75	Do
Totals		1,333,949.92	964,041.97

The trustees' estimated present value of these items as presented at the reopened hearing was not contradicted by any of the parties. The principal items accounting for all but $20,996 of the total present value of $954,042 for all items are:

Acquired February 1920 to January 1945, Fruit Growers Express Company common stock	$296,000
Acquired June 7, 1932, The Peninsular & Occidental Steamship bonds	614,047
Acquired July 1929 to August 1931, Advances to Railway Express Agency, Incorporated	22,999
	933,046

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The date of the debtor's first mortgage is June 1, 1909, and of its first and refunding mortgage September 1, 1924.

All of the above assets of any estimated present value were acquired by the debtor subsequent to the creation of the first mortgage and therefore, are not subject to the lien of that mortgage unless they come within the clauses providing for conveyance of a lien on after-acquired property. The pertinent provisions of those clauses are as follows:

All and singular the entire railroad of the railway company, viz,

* * * * * * *

Also all the lands, tenements, hereditaments acquired or appropriated, or which may hereafter be acquired or appropriated for the purposes of the said railway, and all easements thereunto belonging or in anywise appertaining;

* * * * * * *

* * * and all other property, real, personal or mixed now held or which may hereafter be acquired for or in connection with the construction, operation, maintenance, repairing or replacement of the said railway or any part thereof, or as convenient or necessary for the uses or purposes thereof; and all rights, powers, privileges and franchises, tolls, rents, issues, and profits connected with or relating to the said railway or to the uses and purposes thereof;

A further clause of the first mortgage covers all other property, real and personal, acquired with first-mortgage bonds or the proceeds from their sale.

Specifically covered by a granting clause of the first mortgage are two blocks of shares of stocks of two terminal companies.

As to the first and refunding mortgage, the only one of the three principal items of assets enumerated above which were owned at the time of the creation of this mortgage is an unspecified part of the Fruit Growers Express Company stock.

The pertinent clauses of the first and refunding mortgage are as follows:

Part One

All and singular the railroads, railroad property and appurtenances, franchises, rights and privileges of the Railway Company, now owned, and any and all such property hereafter acquired by it, including the properties more particularly described in this Part One, other than the property in this indenture expressly excepted and excluded, and subject to the provisions in this indenture set forth and contained:

* * * * * * *

III. All other lines of railroad, extensions or branches now owned or hereafter acquired by the Railway Company.

IV. Any and all rights of way, lands, fixtures, structures, improvements, appurtenances, tenements and hereditaments of whatever kind or description and wherever situated now owned by the Railway Company or which at any time hereafter during the continuance of this indenture may be acquired by or for it, provided that such after-acquired property be acquired for some purpose incident

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to or connected with the maintenance, operation, construction or improvement of the railroads and appurtenances subject to the lien of this indenture; including * * * and all other things of whatsoever kind in anywise or at any time belonging or appertaining to any and every line of railway at any time subject to this indenture, or to any branch thereof, or provided for use thereon or in connection therewith.

"Part Two" of the granting clauses of the mortgage covers the same two blocks of stocks in terminal companies covered by the first mortgage, and "Part Three" covers all after-acquired property of every kind and description acquired by the use of first and refunding bonds or the proceeds from a sale thereof.

Both the Coast Line and the equipment D trustee contend that, since these assets are not specifically mentioned in the debtor's mortgages, they are not covered by the liens of the mortgages, citing *Liberty National Bank & Trust Co. of Savannah* v. *Bankers Trust Co.*, 150 Fed. (2d) 453, 456, and *United States* v. *White Sulphur Springs*, 57 Fed. Supp. 48, hereafter referred to as the *Liberty National* and *White Sulphur* cases, respectively.

Since, as above stated, none of the three principal items of these assets was owned by the debtor at the time of the creation of either of the mortgages, with the exception of some undisclosed part of the Fruit Growers Express Company stock, it is obvious that, with such exception, they could not have been specifically mentioned in mortgages.

In the absence of any evidence that any of these assets were purchased with proceeds from the sale of the mortgage bonds, the question in issue is whether these three assets constitute property used on or in connection with, or for the purposes of the railroad or, in the case of The Peninsular & Occidental Steamship Company bonds, constitute extensions of the railroad, as asserted by the St. Joe Company. As stated by the court in the *Liberty National* case, *supra*, which involved a lien dispute arising in connection with a railroad reorganization proceeding, it is necessary in construing the granting clauses of mortgages "to ascertain and give effect to the principal apparent purpose of the parties." This is the well established rule.

In the *White Sulphur* case the nature of the property, viz. resort-hotel property of a company the stock of which was owned by the railroad, is dissimilar to the kinds of properties owned by the companies of which the debtor in the present case owns the disputed stock, bonds, and advances. Maintenance of the hotel properties in the *White Sulphur* case, as the court said, may have resulted in an increase in the railway's passenger and freight business, but was in no sense necessary to that business.

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In the *Liberty National* case, the property in question comprised coal lands from which the railroad obtained coal. The court held that these lands did not come within the after-acquired property clause of that mortgage. The court said—

> • • • It is further significant that at the time the Refunding and General mortgage was given, the coal lands were not being, and had not for many years been, operated by the railroad company but were under lease, the railway having no interest in, or control over, the operation or management, and only an option to purchase from lessor a certain portion of their output. It is true, of course, that their leasing could not take the coal lands out of the earlier mortgages if a lien had once attached, nor could the fact that they were already leased when the Refunding and General mortgage was given prevent the mortgage from covering them if the mortgagor had so intended and so provided. But it is equally true that it is of great significance, in arriving at the intent of the grantor, that at the time the Refunding mortgage was made on the railway properties owned and operated by the mortgagor, it did own these coal lands subject to the lease, and it did not by any kind of enumeration include them in the mortgage.

In the instant case, two of the three principal items of assets comprise stock in the Fruit Growers Express Company which furnishes refrigerator cars to its proprietary railroads, and advances to the Railway Express Agency which furnishes all the express service of its proprietary railroad companies. These companies are not operated directly by the debtor but, as separate organizations, perform their respective services which are essential to the debtor's operation and those of the other proprietary railroads. The third and largest item of the three principal items of doubtful assets represents bonds of The Peninsular & Occidental Steamship Company, all the stock of which is jointly and equally owned by the debtor and the Coast Line. It operates passenger, mail, and freight service between Miami, Fla., and Havana, Cuba, and Port Tampa. In applying for authority under section 5 of the Interstate Commerce Act as amended by the Panama Canal Act "to continue their joint ownership of and to operate" this company, the two proprietary railroads, the debtor, and the Coast Line represented that the steamship company was "but an extension of their respective rail lines." 37 I. C. C. 432. It may be significant in the present case in determining the intention of the parties to the mortgages, to note that they included in the mortgages the two blocks of stocks of terminal companies which were at the time owned by the debtor. From this fact it might be implied that securities of such nature were considered to be adjuncts to the railroad and for that reason intended to be included.

The debtor's trustees state that they are advised by their counsel that, in the opinion of counsel, all these assets are subject to the liens

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of the mortgages with the exception of the scrip, as to which item no opinion is given. They further state that, in litigation with State authorities involving taxation of all the 13 items except the scrip, they "have definitely asserted that such properties are subject to the liens of said mortgages."

Upon all the facts, we find that these three items of assets of contested status represent ownership of, or interest in, property of such a nature as was intended to be included within the after-acquired property clauses of the mortgages and, therefore, are not subject to be used in satisfaction of unsecured claims of the debtor in this proceeding.

Recognizing, however, that a close question may be involved in this finding and that the court may otherwise construe the effect of the mortgage clauses upon these items, we find that the present values of the various items of "free assets" are those estimated in the testimony by the trustees of the debtor as above stated. These values should be used in determining the extent of participation in the plan by unsecured creditors in the event of a decision by the court as to the status of these disputed items differing from our decision herein.

As hereinbefore stated, the trustees of the debtor estimate that allowed general unsecured claims will total $2,535,907. To this amount, in determining the total of all unsecured claims, should be added the amount of the deficiency claim of the first and refunding bondholders.

The total amount of principal of the first and refunding bonds is $45,000,000, all of which is in default. From this amount, in arriving at the allowable deficiency claim of these bondholders, should be deducted the $4,125,000 of cash to be contributed by the Coast Line as hereinafter required, and the value of the new securities to be received by them in the reorganization toward satisfaction of their secured claim. This will comprise all the new securities less any amounts of each class of such new securities as may be required, on the basis hereinafter set forth, for distribution to unsecured creditors in the event that the court finds, contrary to the finding herein, that certain of the assets are free of lien. For the purpose of determining the amount of the deficiency claim, the new bonds to be issued in the reorganization as hereinafter provided, should be considered as of a value equal to their face amount and all the new stock of a value of $100 per share.

In computing the deficiency claim of the first and refunding bondholders, the Atlantic Coast Line, on brief, included an amount equal to the reported undistributed earnings of the debtor during the bankruptcy period applicable to the payment of their claim for interest after payment of interest during that period on prior obligations and interim payments of their own interest.

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The equipment trust D trustee contends that such alleged undistributed earnings during the bankruptcy period do not actually constitute earnings applicable to payment of interest on these bonds, since it has been necessary to use them in improvements of the debtor's property or that they will be so used in the future, and for payment in cash of the bonds secured by the first mortgage, payment of reorganization expenses, and retained as necessary cash working capital. This party asserts that, as representing income distributable to the first and refunding bondholders, these alleged undistributed earnings are nothing more than bookkeeping entries and that these bondholders never will receive them as interest on their bonds, especially since, in the plan heretofore approved, we provided that cash reserves be established for the purposes above stated. These reserves are also required in the plan which will be approved herein.

We will reserve for determination, if the court shall refer the matter to us for consideration, the question of inclusion in the allowable unsecured claim of these bondholders, of all or any portion of the sums reported as earned by the debtor during the court proceedings, but utilized under court authority or under the provisions of the recommended plan for purposes other than payment on the bondholders' claim.

Interest on the steamship company bonds and Railway Express Agency advances and dividends on the Fruit Growers Express Company stock are being currently paid. In recognition of this fact and of the essential nature of the services performed by these companies, we find, that, in the event the court shall determine that any of these assets (if of sufficient total amount in value to be reasonably apportionable to holders of allowed unsecured claims) are not subject to the liens of the debtor's mortgages, then, in such case, (consistent with the provisions as to new securities issuable under the plan which will be hereinafter recommended) there should be applied toward satisfaction of the total amount of allowed unsecured claims such amount of the entire issues of new first-mortgage divisional bonds at their principal amount and such number of shares of common stock of the Coast Line at $100 per share as will together on a basis of one-half new first-mortgage divisional bonds and one-half common stock of the Coast Line equal the total value of such assets so found to be not subject to the liens of the debtor's existing mortgages, less the principal amount of the general unsecured claims which may be paid in cash, as hereinafter recommended. Since the value of all the property owned by the debtor will be considered herein in fixing the total permissible new capitalization, a finding that these assets are not subject to the mortgage liens must result in a decrease in the new divisional

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first-mortgage bonds and Coast Line common stock receivable by the first and refunding bondholders in satisfaction of their secured claims under the terms of the plan to be recommended herein.

If all the items of assets should be found to be free assets, and no unsecured claims should be paid in cash, this would result in the application to satisfaction of allowed unsecured claims of a total amount of about $954,000 to be represented by securities issuable in the reorganization and to that maximum extent, would reduce the amounts of such securities otherwise receivable by the first and refunding bondholders toward satisfaction of their secured claim.

The plan should additionally provide that, in the event of a decision by the court as to the status of these disputed items differing from the decision recommended herein, each holder of an allowed unsecured claim against the debtor shall receive his proportionate share of the total amounts of new divisional first-mortgage bonds and Coast Line common stock so to be applied toward satisfaction of unsecured claims, except that holders of general unsecured claims of less than $100 in amount may be paid cash in satisfaction of their claims, the amounts of cash so to be paid with respect to such claims of less than $100 in amount to be in the same proportion to the total of the claim so paid as the total value of the new securities receivable by the holders of unsecured claims (with the new bonds taken at principal amount and the stock at $100 per share) shall bear to the total amount of their claim.

PROVISIONS OF PLAN APPROVED

Effective date.—The effective date of the plan should be fixed by the reorganization managers with the approval of the court, provided that the effective date should be approximately the date of consummation of the plan and, in no event, earlier than 6 months prior thereto, insofar as the reorganization managers at the time of fixing of the date, with the approval of the court, may be able to determine. All the new securities should be dated as of the effective date.

Transfer of debtor's properties to the Coast Line.—On the consummation date, all the business, assets, franchises, and property of every kind and character, real, personal, and mixed, constituting the estate of the debtor, and all right, title, and interest of the trustees of the debtor's estate therein, should be vested in the Coast Line by merger of the debtor into, or consolidation of the debtor with the Coast Line, or, if the court should approve, by transfer and conveyance by the trustees of the debtor of the property of the debtor to the Coast Line.

Protection of the interests of the debtor's and Coast Line's employees.—The plan should contain provisions for the protection of

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employees as contemplated by section 5 (2) (f) of the Interstate Commerce Act. The act referred to states that, notwithstanding any other provision of the act, agreements pertaining to the protection of the interests of employees may be entered into by a carrier and the duly authorized representatives of employees. Our authorization of the merger or consolidation of the debtor's properties with the Coast Line is granted upon the same conditions as were stated in *Chicago & N. W. Ry. Co. Merger*, 261 I. C. C. 672, but as indicated, that will not bar the Coast Line and authorized representatives of employees from entering into agreements for the protection of the interests of the employees.

Maintenance of existing joint through routes.—Existing through routes via Jacksonville, Fla., to and from points now served by the debtor in connection with Seaboard Air Line Railway Company and Southern Railway system shall be kept open.

Discharge of claims.—On the consummation date the debtor shall be discharged from all its obligations, other than claims to be paid or to be assumed as hereinafter provided, and all mortgage bonds, notes, certificates and shares of stock, and other claims against the debtor or its property, other than as aforesaid, shall, on and after the consummation date, become void and unenforceable against the debtor or the Coast Line or the property of either of them.

Cash reserves.—The plan should provide that the reorganization managers should set aside in a separate fund, out of the debtor's cash on hand, sums of cash in the amounts as hereinbefore set forth as reserves to be expended exclusively for the purposes hereinbefore stated. There should be credited to the reserve to be established for improvements and betterments to the debtor's property any cash expended for such purposes by the trustees of the estate of the debtor prior to consummation, upon order of the court, and any part of such fund which may not have been so expended or appropriated at the date of consummation of the plan should be taken over and held as a separate fund by the Coast Line to be segregated from its other funds, to be expended exclusively for such purposes upon order of its board of directors.

Cash distributions.—The plan should provide that any and all excess cash in the treasury of the debtor, as of date of consummation of the plan, which the court finds was earned prior to the date of consummation of the plan, and is not reasonably necessary for any of the purposes for which cash shall be used or reserved under the terms of the plan, should upon order of the court entered prior to the entering of the order directing consummation of the plan, be distributed pro rata to the holders of the debtor's first and refunding mortgage

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bonds and shall be deemed to constitute part satisfaction of their claims additional to the treatment accorded them by the plan herein recommended for approval.

Undisturbed securities.—The plan should provide that the Coast Line assume all outstanding equipment obligations of the debtor and of the debtor's trustees. We find that the interests of the holders of claims evidenced by all such equipment obligations are not materially and adversely affected by the plan.

Capitalization.—In determining the provisions of a plan which will vest control of the debtor's property in the Coast Line by merger of the two carriers, and which will afford the debtor's creditors the full equitable equivalent of the value of the securities which they now own, we will take into consideration the fact that such creditors must surrender all opportunity to recoup directly from future operation of their property any losses which they will suffer in the reorganization and must depend for such recoupment upon a successful future operation of the Coast Line in which they have no present interest or expectation of future control.

While we have heretofore found that the prospect of future earnings from the debtor's line under independent operation does not warrant the issuance in reorganization of any fixed interest bearing indebtedness (other than equipment obligations), we find that the Coast Line's wider diversity of traffic, the more extensive territory which it serves, and its past record of coverage of its fixed interest, as hereinbefore reviewed, will permit the issuance of a reasonable amount of fixed-interest bonds in payment for its acquisition of the debtor's railroad. Otherwise, the debtor's creditors would be required to receive, upon reorganization, securities of the Coast Line all of which were subordinate as to payment of interest to the fixed interest which the Coast Line pays upon about $83,500,000 of its indebtedness (exclusive of equipment obligations) now outstanding.[34] As heretofore stated, the Coast Line's present annual fixed-interest charges amount to approximately $4,100,000. Its contingent interest charges are negligible.

In each of the years 1936–45, the Coast Line earnings available for payment of interest exceeded its present annual interest requirement by the following approximate amounts:

Year 1936	$3,452,241
Year 1937	3,958,354
Year 1938	90,236
Year 1939	2,405,274
Year 1940	3,079,659

Average excess for the period 1936–40, $2,597,153

[34] As of December 31, 1945.

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Year 1941	$12,415,330
Year 1942	24,048,090
Year 1943	18,249,119
Year 1944	16,450,557
Year 1945	6,006,035

Average excess for the period 1936–45, $9,015,490

For the same years the debtor's earnings available for payment of interest were as follows:

Year 1936	$1,178,740
Year 1937	736,651
Year 1938	941,996
Year 1939	1,360,068
Year 1940	959,099

Average for the period 1936–40, $1,035,311

Year 1941	$1,601,964
Year 1942	7,985,400
Year 1943	9,074,252
Year 1944	5,835,252
Year 1945	4,337,148

Average for the period 1936–45, $3,401,057.

Prospective normal year earnings, $1,500,000.

A combination of the average annual excess amounts available for payment of interest earned by the Coast Line, and of the average annual earnings of the debtor available for interest for the period 1936–40, produces $3,632,464 and for the entire period 1936–45, $12,416,547. If the average annual 1936–40 excess of the Coast Line is added to the prospective normal year earnings of the debtor, the total is $4,097,153.

We conclude that the prospective combined earnings of the two carriers warrant the issuance to the debtor's first and refunding bondholders in the reorganization of an amount of not less than $13,500,000 of Coast Line 25-year fixed-interest first-mortgage divisional bonds secured by a first lien on all the debtor's property and bearing interest at the rate of 3½ percent per annum. This additional annual fixed-interest requirement which the Coast Line will be required to bear after assuming operation of the debtor's property will be only $472,500. Additionally, the mortgage securing the bonds shall provide for annual payments into a sinking fund for retirement of the bonds equal to one-half of 1 percent of the maximum face amount of bonds at any time outstanding. This will require an additional annual charge of $67,500, which, added to the interest, produces a total of $540,000. The mortgage securing the bonds should be a closed mortgage.

The Coast Line plan provides for $11,250,000 of 4¼-percent divisional income bonds maturing in 75 years secured by a closed

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mortgage having a lien on all the debtor's property subject only to the lien of the first mortgage. Because of the greater amount of first-mortgage bonds recommended for approval, we approve the issuance of a somewhat smaller amount of income bonds than the amount provided for in the Coast Line plan. A total of $7,875,000 of such bonds will produce a total indebtedness with respect to the debtor's property of $21,375,000 and will permit the issuance to each holder of $1,000, principal amount, of the debtor's first and refunding bonds of $175, principal amount, of the income bonds. The annual interest requirement on such bonds will be $334,687.50 and, additionally, a contingent annual sinking-fund requirement of one-half of 1 percent, which should be provided for, will require $39,375, making the total annual requirement with respect to the income bonds $374,062.50, and the total annual requirement on both issues of new bonds $914,062.50. We approve the issuance in reorganization of these income bonds in the amount above stated.

New Coast Line $100-per-share par-value preferred stock of total par value of $9,000,000 should also be issued to the debtor's creditors as provided in the Coast Line plan, except that certain features of the preferred stock as described in that plan should be changed as hereinafter provided. These changes should include a provision that the stock, in addition to bearing a $4 per year dividend rate, should also participate share for share with the Coast Line common stock in all dividends paid on the latter in excess of $4 per share per annum. This will permit the debtor's present creditors to share more equitably than under the terms of the Coast Line plan in any periods of unusual prosperity which may be experienced by the Coast Line system in the future and should enhance the market value of the new preferred stock. We find this to be a reasonable provision in view of the relinquishment by the present creditors of the debtor of their right to realize any return in the future from ownership of the present security for their debt and also find it to be a reasonable part of the total consideration which should be paid by the Coast Line to obtain the ownership and control of the debtor's property, which it so urgently seeks. The annual dividend requirement on the new preferred stock (before any dividends could be paid on the Coast Line common stock) will be $360,000. The new preferred stock should be cumulative to the extent hereinafter specified. In order to provide the present creditors of the debtor with some appreciable voice in the management of the Coast Line in view of their substantial investment in that company, each share of the new preferred stock should have equal voting rights with each share of the common stock in the election of directors.

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The total of all annual requirements with respect to acquisition by the Coast Line of the debtor's property thus would be $1,274,062.50 (exclusive of $58,552 of estimated annual interest on equipment obligations of the debtor) an amount well within the normal year estimate of $1,500,000 of earnings for the debtor and also well within the combined past earnings capacities of the two carriers as above reviewed.

The $6,000,000 of present Coast Line common stock (stated at $100 per share) offered the debtor's creditors under the terms of the Coast Line plan is also approved.

In conformity with the above findings, the additional capitalization and the annual charges of the Coast Line with respect to its acquisition by merger of the debtor's property and the principal amount of each security receivable upon reorganization by each holder of $1,000, principal amount of the debtor's first and refunding mortgage bonds, are shown in the following table:

	Capital structure (exclusive of equipment obligations)		
	Per $1,000 first and refunding mortgage bond of debtor	Total of new security	Annual requirement on total
Coast Line divisional first-mortgage fixed-interest 3½-percent 25-year bonds.	$300.00	$13,500,000	{$472,500.00 fixed interest. {$67,500.00 fixed sinking fund payment.
Coast Line divisional income 4½-percent, 75-year bonds.	175.00	7,875,000	{$334,687.50 contingent interest. {$ 39,375.00 contingent sinking-fund payment.
Coast Line participating cumulative $100 par-value $4-dividend preferred stock.	200.00	9,000,000	$360,000.00
Coast Line common stock (present stock no par value, stated at $100 per share).	133.33	6,000,000	----------
Total of securities and annual requirements.	808.33	36,375,000	$1,274,062.50

In view of the fact that the debtor's properties and its earnings would be merged with those of the Coast Line, no capital fund should be required with respect to acquisition of the debtor's properties. The depreciation now chargeable by carriers on road property and which would be deductible from the payments into a capital fund which we might otherwise provide, will to a large extent render such a requirement for a capital fund unnecessary.

It will be noted from the above table that the total capitalization will amount to $36,375,000 which is $4,125,000 less than the maximum permissible capitalization determined by us in our plan previously approving an independent reorganization of the debtor. The plan, therefore, should provide positive assurance that the Coast Line will

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pay $4,125,000 out of its own cash in addition to the issuance of the above securities. This will result in payment to each holder of $1,000 principal amount of the debtor's outstanding first and refunding bonds of an amount of $91.67 in cash additional to any cash otherwise distributable to them from the debtor's estate as hereinbefore provided.

Any cash remaining in the debtor's treasury upon consummation of the reorganization after the setting aside of the reserves hereinbefore provided, should also be distributed to the debtor's creditors at that time. Prior to consummation of the plan, they should also be permitted to receive additionally any interim payments of interest upon their bonds which the court may order paid upon its finding that cash so paid is not required to be reserved under the terms of the plan.

The annual return receivable by each holder of $1,000, principal amount, of the debtor's outstanding first and refunding bonds upon the new securities allocable in the reorganization as above determined, before dividends on the common stock, will be as follows:

On $300 new divisional fixed-interest 3½-percent first-mortgage bonds	$10.50
On $175 new divisional 4¼-percent income mortgage bonds	7.44
On $200 new Coast Line participating cumulative preferred stock ($4 dividend)	8.00
Total	25.94

Additionally such holder will receive dividends, if declared and paid, upon $133.33 of Coast Line common stock. In 1946 a dividend of $4 per share was paid on this stock. At that rate, the amount of common-stock dividends receivable by each holder of $1,000 of the debtor's first and refunding bonds would be $5.33, increasing the above total return to $31.27. Each holder of first and refunding bonds of the debtor will also receive on his new preferred stock additional dividends equaling per share any increase in the dividends per share on the common stock in excess of $4 per annum.

While the total return receivable by the first and refunding bondholders on the new securities as herein recommended will be about the same as the total return receivable on the new securities offered under the Coast Line original plan, the new securities should prove, as a whole, of considerably greater value than those offered by the Coast Line, because of the increased amount of fixed-interest first-mortgage bonds, and the participating and voting features of the new preferred stock. In view of the relatively small amount of the new Coast Line preferred stock as compared with the 883,427 shares of Coast Line common stock, which will be outstanding after this reorganization is consummated, the addition of the above provisions

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with respect to the new preferred stock should have no appreciable adverse effect upon the value of the Coast Line common stock.

We find that the above securities and cash payment of the Coast Line, together with any other cash distributable to the first and refunding bondholders of the debtor's estate, will constitute, in view of the greater stability of earnings in the future, which should be realized in the unified properties under Coast Line control as compared with independent management, the equitable equivalent of the rights of these creditors in and to the property of the debtor. We find that the cash upset price upon sale of the property should be not less than the value of such securities plus the cash payment to be made by the Coast Line. An upset price so determined, will, in our opinion, approximate the valuation for purposes of reorganization of $40,500,000, which we have ascertained for the properties of the debtor.

During the period embracing the year 1946 and 1947 to March 1, the market price of the Coast Line common stock ranged between 83 and 45, the price at the end of that period being about 55.

Further description of the new securities.—Where not inconsistent with the conclusions above stated, the provisions of the Coast Line plan relating to the characteristics and terms of the new securities and of the new mortgages securing the new bonds, are approved substantially as stated in that plan.

Both the first-mortgage and income mortgage bonds should be obligations of the Coast Line.

As to the new divisional first-mortgage bonds, the provisions of the Coast Line plan include, among others, (1) privilege to redeem the bonds in whole or in part on 30 days' notice at their principal amount plus a premium of 2 percent if redeemed during the first 9 years, such premium decreasing by one-eighth of 1 percent on the first day of the tenth year and of each succeeding year so that there will be no premium or redemption in the last year prior to maturity, except that the bonds would be redeemable for the sinking fund at their principal amount plus accrued interest; (2) a provision that any redemption of the bonds for any purpose, of less than all of the bonds should be by lot; and (3) a sinking-fund provision as hereinbefore stated, an amendment clause, and a so-called "escape clause."

The first mortgage will be secured by a direct first lien on all the debtor's property except its cash, accounts receivable and such other current assets as are not customarily subjected to the liens of railroad mortgages, and assets not necessary for the operation of the railroad and as may be specified in the mortgage, such lien to be subject only to any liens on equipment and any prior charges described in the plan

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as comprising claims (to the extent allowed) arising from the administration of the trust estate during the bankruptcy and prior receivership proceedings, claims entitled to priority over the debtor's mortgages, including labor claims entitled to such priority, claims for taxes and special assessments, and claims for interest and principal on the debtor's bonds for the payment of which provision has been made by the debtor or by the court but which have not been paid because not presented for payment. To the extent not paid, payment of such claims will be assumed by the Coast Line, provided that they shall constitute a charge on the property subject to the first mortgage, which will be prior in lien to the bonds issuable thereunder. The first mortgage would also have a first lien on all such property acquired in replacement of any property originally mortgaged and, in such manner and with such exceptions as may be provided in the mortgage with our approval and the approval of the court, on all other such property which may be appurtenant to the lines of railroad originally mortgaged.

With respect to the income mortgage, the Coast Line plan includes a redemption privilege without premium, accumulation of interest up to a maximum amount of 12¾ percent but no more, and requires annual payments to be made if earned into a sinking fund for retirement of the bonds, the bonds so retired to be either purchased or redeemed. The income bonds will be secured by a lien on all the property of the debtor, including after-acquired property, which is subject to the lien of the first mortgage, the lien of the income mortgage to be subject only to the lien of the first mortgage. Other provisions of the income mortgage should be similar to those of the first mortgage.

All the above provisions with respect to both first-mortgage and income mortgage bonds are approved.

In addition to the provisions for voting privileges and participation in additional earnings, which have been already referred to, the new preferred stock should be cumulative to the extent of 12 percent whether or not earned in any year of such accumulation, but thereafter only to the extent earned but not declared or paid. Dividends on the preferred stock should be payable quarterly, and no dividends should be paid or set aside for payment on the Coast Line's common stock nor should a purchase or redemption by the Coast Line of any of such common stock be permitted as long as any accumulated dividends remain unpaid on the preferred stock. In determining the amount of accumulation of dividends at any time, no dividends paid in any year previous to the first year of such accumulation in excess of 4 percent should be credited against the nonpayment of the 4 percent dividend in any subsequent year. The preferred stock should

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be redeemable as a whole or in part by lot at any time on at least 30 days' notice at par plus all accumulated dividends and upon payment of the current dividend (in no case less than at the rate of $4 per annum) to date of redemption. In the event of the dissolution, winding up, liquidation, or reorganization of the Coast Line, the holders of the preferred stock should be entitled to receive the par value of their shares and accumulated dividends before any distribution could be made to holders of the common stock. Thereafter, they should be entitled to no further share in any assets of the Coast Line.

The common stock should be the outstanding common stock of the Coast Line or the equivalent thereof, in the event of any stock dividends, split-ups, or the issuance of any rights subsequent to October 1, 1945. If the date of the consummation of the plan should be prior to the date as of which holders of such stock will receive payment of a dividend on the common stock previously declared, a cash adjustment should be made to the holders of the common stock allocable in this reorganization.

Determination and application of available net income.—Available net income shall be determined for each calendar year beginning with the calendar year in which the plan shall be consummated (except that the first period may be less than a calendar year in the event the plan should be consummated on some date other than January 1), on or before May 1 of the following year.

Available net income for each year should be determined by deducting all fixed charges of the Coast Line (including the sinking-fund payment for retirement of the divisional first-mortgage bonds) accruing in such year from the Coast Line's balance available for fixed charges for such year (determined in accordance with our accounting rules or those of any other governmental agency having jurisdiction in the premises at the time in effect, or, to the extent not governed by such accounting rules, in accordance with sound accounting practices).

Available net income should be determined for each year as the accounts are stated on the books of the Coast Line when its accounts are closed for such period, without adjustments, except that (1) if in respect to any year the available net income is a deficit, the amount of such deficit should be carried forward and be deducted in determining available net income for the succeeding year or years until such deficit (or accumulated or remaining deficits) be extinguished by earnings, which, in the absence of such deficit or deficits, would be available net income; and (2) any adjustments necessary to correct the income accounts of any prior year should be made by appropriate entries which may either be made in the accounts of the current year

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or, in the discretion of the board of directors of the Coast Line and subject to our approval or that of such other governmental agency, if any, as at the time may have jurisdiction over the accounting practices of the Coast Line, may be made, in whole or in part, in the accounts of any subsequent year or years, and any such debits or credits made in the accounts of any year to adjust entries in the income account of prior years should be treated as income items for the year in which entered on the books, whether cleared through income or profit and loss accounts; and (3) in computing such available net income no amounts should be deducted for retirements of nondepreciable property.

Available net income for each year should be applied, to the extent necessary, to the following purposes and in the following order:

(*a*) To the payment of currently payable interest on the divisional income mortgage bonds.

(*b*) To the payment of accumulations of interest on the divisional income mortgage bonds.

(*c*) To the current sinking-fund payment on the divisional income mortgage bonds.

(*d*) To payments into the sinking fund to the extent of the difference, if any, between the amounts paid in prior years and the amounts which would have been payable if the available net income in prior years had sufficed for payments of $39,375 a year.

(*e*) To any proper corporate purpose of the Coast Line (except dividends on its common stock) including if and to the extent that such dividends are declared by the directors, the payment of dividends on Coast Line preferred stock, including the payment of 4-percent dividends upon the new preferred stock (issued in this reorganization proceeding) in respect to such year and of any accrued and unpaid cumulative dividends on the new preferred stock.

(*f*) To any proper corporate purpose of the Coast Line, including, if and to the extent that such dividends are declared by the directors, the payment of dividends upon the common stock of the Coast Line to a maximum amount of $4 per share but only after all accrued and unpaid cumulative dividends upon the preferred stock have been paid or set aside for payment.

(*g*) To any proper corporate purpose of the Coast Line including, if and to the extent that such dividends are declared by the directors, the payment of additional dividends equally on a share-for-share basis on the new preferred stock issued in this reorganization proceeding and on the common stock of the Coast Line.

The divisional income mortgage should provide that in the event of a consolidation, merger, conveyance, or lease involving the Coast

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ine, a separate income account shall not thereafter be required in spect to the operation of the property subject to the lien of the mort- ge and shall specify, or provide for the determination of, an equit- ble method of ascertaining what portion or portions of the revenues nd expenses of any successor or lessee corporation shall be used for ne determination and application of available net income under the ortgage.

Treatment of existing securities and claims.—Upon consummation f the plan, or prior thereto if the court should order, holders of the ebtor's first-mortgage 4½-percent bonds, due June 1, 1959, shall re- eive for each $1,000, principal amount, of bonds held, cash in the full rincipal amount plus all accrued and unpaid interest to date of pay- ent of the principal. When so paid the interests of these bondhold- rs are held not to be materially and adversely affected by the plan.

Holders of the debtor's first and refunding mortgage 5-percent onds, series A, should receive for each $1,000, principal amount, of onds held and all accrued and unpaid interest to the effective date f the plan, approximately $91.67 of cash payable by the Coast Line out f its own cash on hand, $300, principal amount, of new Coast Line ivisional fixed-interest 3½-percent 25-year first-mortgage bonds, 175, principal amount, of new Coast Line divisional 4¼-percent 75- ear divisional income mortgage bonds, $200, par amount, of new oast Line participating cumulative $4 preferred stock, 1.33 shares f Coast Line common stock, and a ratable share of all cash of the ebtor in the possession of the debtor's trustees which may be dis- ributed upon consummation of the plan in accordance with the pro- isions for cash distribution hereinbefore stated.

The plan should provide that the interests or equities of (1) holders f unsecured claims against the debtor not entitled to priority over ne or more of the mortgages of the debtor and (2) holders of the apital stock of the debtor, have no value and nothing shall be dis- ributed to them in the reorganization.

If, however, the court shall find that there are assets of the debtor, ot subject to the liens of its existing mortgages, of sufficient value to e practicable of apportionment among the holders of unsecured claims gainst the debtor, using in such determination the values of the assets s hereinbefore fixed by us, then in such case there should be applied owards satisfaction of such unsecured claims and distributed to olders of such claims, a part of the new securities distributable and ssuable in the reorganization, such part to be determined and distrib- ted in the manner hereinbefore described, and the treatment of the ebtor's first and refunding mortgage bondholders with respect to

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satisfaction of their secured claims against the debtor's estate should in such event, be modified as hereinbefore specified.

The Coast Line, in connection with any settlements of transportation accounts between the United States and the debtor, should be required to recognize and pay or allow for any and all sums determined through audit, adjustment, compromise, or litigation, as due the United States by virtue of the provisions of section 322 of the Transportation Act of 1940, 54 Stat. L. 955, for payments made prior to the date of confirmation of a plan of reorganization, without requiring proof thereof in this reorganization proceeding and without prejudice by reason of such sums not having been proved herein, with the same relative priority as they now have with respect to other obligations of the debtor.

Claims not affected by plan.—The following claims to the extent allowed are held not to be affected by the plan: (*a*) Claims arising from the administration if the trust estate and operation of the property subsequent to the filing of the petition under section 77 of the Bankruptcy Act, as amended, on January 25, 1941; (*b*) obligations of the receivers incurred in the receivership proceeding between the time of appointment of the receivers on August 31, 1931 and the filing on January 25, 1941 of the petition under section 77 of the Bankruptcy Act, as amended, and reasonable administrative expenses, and allowances in that proceeding, to the extent that provision shall be made therefor by the court in the present proceedings; (*c*) claims entitled to priority over one or more of the mortgages of the debtor, including labor claims entitled to such priority; (*d*) claims for taxes and special assessments; (*e*) claims for interest and principal, provision for payment of which has been made by the debtor or by the court, but which have not been paid because not presented for payment. To the extent that such claims, liabilities, or obligations are not paid by the debtor or the trustees of the estate of the debtor pursuant to order of the court in the reorganization proceeding, they should be assumed by the Coast Line and paid in cash in due course, provided that any amounts of the foregoing classes (*a*) to (*e*), inclusive, assumed by the Coast Line shall constitute a charge upon the property securing the new divisional mortgages, such charge to be prior in lien to such new divisional mortgages. All such claims, liabilities, and obligations may be adjusted or compromised and dealt with or paid or discharged by the Coast Line, all as may be determined by its board of directors. In view of the above provisions, the interests of the holders of such claims of the foregoing classes (*a*) to (*e*), inclusive, against the debtor are held not to be materially and adversely affected by the plan.

Expenses of reorganization.—All costs of administration of the trustees of the debtor and all expenses of reorganization, including the

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amounts of all claims for compensation and expenses allowed pursuant to section 77 of the Bankruptcy Act, should be paid in cash.

Assumption or disaffirmance of leases or contracts.—The plan should provide that the Coast Line shall assume such of the contracts of the debtor which are executory in whole or in part, including any executory leases and liabilities under guaranties as shall have been affirmed by the trustees of the estate of the debtor in the reorganization proceeding with the approval of the court, and also any executory contracts made by the trustees of the estate of the debtor with the approval of the court in the reorganization proceeding, which, by their terms, do not terminate at the conclusion of the reorganization proceeding. When such contracts are assumed by the Coast Line, the interests of the other parties to such contracts are held not to be materially and adversely affected by the plan.

Listing of the new securities on the stock exchange.—The plan should provide that the reorganization managers or the board of directors of the Coast Line shall, upon the issuance of the new securities, or if practicable prior thereto, cause the filing promptly of an application for the listing of the new securities on the New York Stock Exchange.

Reorganization managers.—The plan should provide that the reorganization managers shall not be more than three in number, all to be appointed by the court, and shall carry out the plan under the supervision and control of the court. The reorganization managers should have general supervision of the carrying out of the plan.

The reorganization managers should have, subject to any requirements of law and requisite approval of the court and of us, full and plenary discretionary power to take all such action and to enter into such arrangements, financial and otherwise, as they may deem necessary or advisable, in order to consummate and carry into execution the plan or any modification thereof; to fix the compensation of persons whose services they may employ in the execution of their powers; to supervise the transfer of the debtor's properties to the Coast Line; to determine the form and provisions, so far as not otherwise herein specifically provided, of the new bonds and the mortgages under which the same shall be issued, the new preferred-stock certificates and any other instruments deemed by the reorganization managers to be necessary or proper in connection with the plan; and to do all other acts in their discretion advisable for carrying out the plan. All fees and expenses of the reorganization managers should be payable out of the estate of the debtor upon order of the court within maximum limits to be fixed by us.

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The plan should provide, however, that the court shall, before they are put in use, approve the new mortgages, trust agreements, bonds, securities and preferred-stock certificates.

The plan should provide that the reorganization managers may act by a majority as from time to time constituted, at a meeting or in writing without a meeting. The plan should provide that they may employ such agents, attorneys, and others as they may deem desirable for the purposes of the plan. They may from time to time delegate to others any power or discretion conferred upon them by the plan and they should not be liable for any action taken or omitted by them in good faith or by any person employed by them in good faith, except for their respective individual malfeasance or willful neglect.

The plan should provide that the reorganization managers shall not be authorized to solicit deposits of securities for purposes other than exchange or to solicit authorizations to represent security holders, except upon approval by us of the terms of such solicitation, pursuant to section 77 (p) of the Bankruptcy Act.

Acceptance of the plan, participation therein and execution thereof.—The plan should provide that acceptance of the plan shall include acceptance of the new bonds, mortgages, stock certificates, and all instruments necessary and appropriate to the carrying out of the plan, other than the orders of the court and the Commission, to the same effect, as though the terms of such instruments were set out in full in the plan.

The method by which creditors and other parties in interest may, after confirmation of the plan by the court, participate therein should be determined by the reorganization managers, with the approval of the court, and notice thereof duly given.

Notice and construction of plan.—Unless otherwise provided in section 77 of the Bankruptcy Act, as amended, or any order or orders of the court in the reorganization proceeding or of the Commission, whenever notice shall be required or permitted to be given under or pursuant to the plan, such notice should be given by publishing a copy thereof once in each week for two consecutive weeks in one newspaper published and of general circulation in the city of Jacksonville, State of Florida, and in one newspaper published and of general circulation in the city of Miami, State of Florida, and also (1) in case of notice to security holders who have accepted the plan, by mailing such notice, postage prepaid, to the addresses of such security holders set forth in the acceptances signed by them, and (2) in case of notices to security holders who shall not have accepted the plan, by mailing such notices,

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postage prepaid, to such security holders whose names and addresses are available, but failure to mail any such notices, or delay in mailing any such notices, should not invalidate the notice by publication above provided, which alone should be held sufficient.

The construction of the plan by the court should be final and conclusive. The court should be given the power to cure any defect, supply any omission, or reconcile any inconsistency, in such manner or to such extent as may be necessary or expedient in order to carry out the plan effectively.

The carrying out of the plan should be as provided in the Bankruptcy Act.

Taxes due United States.—The plan should provide that the Coast Line will assume liability for, and will pay in full in due course any and all taxes due to the United States from the debtor of the trustees for any taxable period prior to the date of confirmation of a plan of reorganization (including any such taxes the payment for which is hereinbefore provided), without requiring proof thereof in this proceeding and without prejudices by reason of not having been proved herein, subject, however, to the statutes of limitation normally applicable to the assessment and collection of such taxes, provided, however, that the liability of the Coast Line for any of the above taxes which are the subject of litigation on the date of the confirmation of the plan of reorganization, or which may become the subject of litigation on any date thereafter and prior to the expiration of the applicable statute of limitations, shall be determined pursuant to law, and provided, further, however, that this provision shall not be deemed to preclude either the debtor, the trustees of the debtor, or the Coast Line from contesting the merits of any such tax in the manner provided by law.

SUMMARY OF FINDINGS

The principal findings upon which we have based our approval of the plan hereinabove set forth are summarized as follows:

1. The plan for acquisition of the debtor's property filed by the Coast Line is properly before us for consideration in this proceeding.

2. The record is sufficient in all respects for a determination of the issue of the public interest involved in an acquisition of the debtor's properties by the Coast Line.

3. It is not necessary that the Atlantic Coast Line Company and Safe Deposit and Trust Company join with the Coast Line in the filing of the latter's plan for reorganization of the debtor.

4. Upon making the necessary findings as to the public interest involved in the future control of the debtor and as to satisfaction of the claims of the debtor's creditors, we have the power under section

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77 of the Bankruptcy Act to approve a plan transferring the debtor's properties to the Coast Line.

5. There must be of record a substantial preponderance of evidence in favor of merger of the debtor's line with the Coast Line to justify the transfer.

6. There will be betterment of service to the public resulting from a unification of the debtor's properties with the Coast Line particularly with respect to (*a*) passenger service, in that locomotive runs will be lengthened, equipment pooled, passenger traffic offices consolidated, through operation of dining cars effected, advertising programs combined, train personnel coordinated, interline tickets eliminated, and adjustment of ticket refund and baggage claims simplified; and (*b*) freight service, in that stoppage in transit privileges will be facilitated, joint-line differentials over single-line hauls on certain commodities eliminated, reciprocal switching charges on shipments to and from industries located on the debtor's or Coast Line's tracks at Jacksonville and South Jacksonville eliminated, the placing of diversion and reconsignment orders made more convenient to shippers, a single operation of movement of sugarcane into the sugar plant at Clewiston effected, the Jacksonville switching yards consolidated with consequent savings in time now consumed in interchange and expedition of freight-train movement in both directions, and the freight stations at Jacksonville consolidated, affording more convenience to shippers and receivers of less-than-carload freight.

7. There will result savings from a unification of the two carriers through (*a*) eventual unification of the executive and supervisory forces of the two carriers; (*b*) consolidation of interchange yards at Jacksonville; (*c*) unification of operations of the freight stations of the two carriers at Jacksonville; (*d*) coordination and consolidation of off-line traffic offices of the two carriers; (*e*) unification of the purchasing departments and storehouses; and (*f*) reduction in inventory and handling of materials and supplies.

8. The interests of the railroad employees affected by the merger will be adequately protected.

9. The apprehensions of the citizens and communities of the east coast of Florida that a merger would adversely affect their interests are not justified since (*a*) it would be to the interest of the Coast Line to serve all its territory impartially, (*b*) existing through routes via Jacksonville would be maintained, and (*c*) while the Coast Line would attempt to retain its long haul, its appeal to the public would be based primarily on the quality of its service, and the traffic relationships between trunk-line carriers would prevent any abuse of power such as would be possible under control of the debtor's line by the St. Joe Company.

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10. The effect of a merger upon the Southern Railway system and Seaboard Air Line Railroad Company, if any, would not adversely affect the public interest.

11. The merger of the debtor with the Coast Line will be of appreciable benefit in assuring greater financial stability for the debtor.

12. It would not be compatible with the public interest for the St. Joe Company to control the debtor's property.

13. Control of the debtor by the St. Joe Company would be contrary to the public interest, since St. Joe would be in a position, particularly because of its large banking interests, to influence a great number of shippers or receivers to route their shipments over any connecting carrier which, because of advantageous division arrangements, or for other reasons of its own, it may wish to favor and that such opportunity given to a private institution of admittedly widespread power presents a situation which might have grave consequences and against which it would be impossible adequately to protect the shipping public and the carriers with which the debtor's line connects.

14. In general, there is a substantial preponderance of evidence that a merger will insure a more adequate, economical, and efficient transportation service than will operation of the debtor by the St. Joe Company.

15. While the plan proposed by the Coast Line is inequitable in that it does not provide for full satisfaction of the value of the claims of the debtor's creditors, the plan as hereinabove modified will comply with such requirement and otherwise be in the public interest. The cash upset price upon sale of the debtor's properties is fixed at not less than the stated value of the new securities provided for in the approved plan plus the cash payment to be made by the Coast Line. It is found that an upset price so determined will approximate the valuation of $40,500,000 fixed by us for the property for the purpose of reorganization.

16. It would be compatible with the public interest for the Coast Line to control the debtor's property.

CONCLUSIONS

Many of the petitions for modification of our report and order of January 8, 1945, not hereinbefore discussed, are with respect to specific terms which should be included in a plan which would contemplate operation of the debtor's line of railroad as an independent carrier after reorganization. In view of the approved merger or consolidation of the debtor's railroad with the Coast Line, it is unnecessary to discuss such petitions herein.

Upon further consideration, we conclude that all of the petitions for modification of the report and order of January 8, 1945, approving

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a plan of reorganization for the debtor, should be denied, except to the extent hereinbefore specified.

We further conclude that the plan approved by our report and order of January 8, 1945, pursuant to section 77 of the Bankruptcy Act, as amended, should be modified to conform substantially with the plan hereinbefore described, and that the plan as thus modified will result in the furnishing of adequate and economical transportation service to the public and will adequately protect the interests of the railroad employees affected by the proposed merger or consolidation of the debtor's property with the Coast Line; that the guaranty or assumption by the Coast Line of the payment of additional dividends and additional fixed and contingent interest charges in connection with the issuance of new securities as aforesaid and assumption of obligation with respect to existing obligations of the debtor will not be contrary to the public interest; and that the plan as thus modified will meet the requirements of section 77 (b) and (e) of the above act and should be approved.

Nothing contained in the plan as herein approved should be, or be construed as, a grant of authority for the issue of any securities, assumption of obligations, transfer of any property, sale, consolidation, or merger of the debtor's properties, or pooling of traffic pursuant to either the Bankruptcy Act or the Interstate Commerce Act, until further appropriate action by us upon confirmation of the plan by the court.

An appropriate supplemental order will be entered.

MAHAFFIE, *Commissioner*, dissenting:

I dissent. In order to give control of this property to the Atlantic Coast Line Railroad Company it is proposed to offer that company an option to acquire it by settling the claims of the first and refunding bondholders for $4,125,000 cash, plus $36,375,000 par amount of Atlantic Coast Line securities, a total of $40,500,000. The value of these securities is substantially less than this par amount. The claim, principal and interest, thus to be settled amounted on December 31, 1946, to $83,961,920. The Atlantic Coast Line is a stranger seeking to acquire. From the standpoint of priorities it cannot be considered to have a rank superior to that a junior creditor or a stockholder would have. Perhaps it should rank lower. And any right of a junior creditor or stockholder to participate in the assets of this bankrupt estate exists only if the senior obligations are satisfied in cash or securities having a value equal to their face amount. As the Supreme Court put it in *Insurance Group Committee* v. *Denver & R. G. W. R. Co.*, 67 S. Ct. 583, 329 U. S. 607, decided February 3, 1947:

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Until it can be contended with some show of reasonableness that the creditors senior to the creditors and stockholders whom the debtor represents here have received more in value than the face of their claims, the debtor's insistence on a reexamination of the plan is without substantial support. See *Northern Pacific Ry. Co.* v. *Boyd*, 228 U. S. 482; *Group of Investors* v. *Milwaukee R. Co.*, 318 U. S. 523, 541.

Cash and securities as here provided which have a value less than half the face amount of such claims do not meet this test. If the Atlantic Coast Line is to acquire this property, it should be as a result of making the highest and best bid at a public sale at which other bidders, including the bondholders of the debtor, have a chance to compete.

Aside from what seems to me a fatal legal defect in the report, I think it wrong on the merits. The principal controversy before us is whether the public interest will be best served by making this property a part of the Atlantic Coast Line system or by permitting it to remain independent of railroad control. On that issue much testimony was taken. Extensive briefs were filed and argument lasting 2 days was heard. The majority decide the issue in favor of the Atlantic Coast Line. I submit that the great preponderance of the pertinent testimony is to the contrary. The views of the persons served by the railroad, the persons dependent on it for a livelihood, and of those who own its securities all have to be very largely disregarded in order to reach the majority conclusion. I would approve a plan which, in its main features, is substantially as proposed by the examiner. This would permit the property to be reorganized. The result of the present report, in my judgment, is more likely to be prolonged litigation.

I am authorized to state that COMMISSIONERS MILLER and SPLAWN join in this expression and that COMMISSIONER LEE joins in this expression to the extent that it relates to the plan of the Atlantic Coast Line.

COMMISSIONER JOHNSON participated in the consideration and disposition of this proceeding.

COMMISSIONER BARNARD was necessarily absent and did not participate in the disposition of this proceeding.

COMMISSIONER MITCHELL was not a member of the Commission when this case was submitted and did not participate in the disposition of this proceeding.

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INTERSTATE COMMERCE COMMISSION

FINANCE DOCKET NO. 13170

FLORIDA EAST COAST RAILWAY COMPANY REORGANIZATION

Submitted January 9, 1948. Decided March 25, 1948

Upon further consideration, petitions for modification of plan of reorganization of Florida East Coast Railway Company, pursuant to section 77 of the Bankruptcy Act, as amended, denied. Conclusions and findings in third supplemental report 267 I. C. C. 295, affirmed.

Appearances as shown in prior reports, and, in addition, *James F. Byrnes* and *Sidney S. Alderman*, for interveners.

FOURTH SUPPLEMENTAL REPORT OF THE COMMISSION

BY THE COMMISSION:

Within the statutory period of 60 days from the date of our third supplemental report and order of April 8, 1947, 267 I. C. C. 295, further modifying and approving a plan for the reorganization of the Florida East Coast Railway Company, debtor, pursuant to the provisions of section 77 of the Bankruptcy Act, 11 U. S. C. 205, petitions for its modification were filed by St. Joe Paper Company, the Lynch interests, E. N. Claughton, F. K. Conn, Southern Railway System, Seaboard Air Line Railroad Company, Railway Labor Executives' Association, Brotherhood of Railroad Trainmen, Jacksonville Chamber of Commerce and Jacksonville Traffic Bureau, Miami Chamber of Commerce and Greater Miami Traffic Association, city of New Smyrna Beach, city of Fort Pierce and St. Lucie County, Board of County Commissioners of St. Johns County, and New York Trust Company. As permitted by our notice of May 20, 1947, supplements to most of those petitions were later filed. Replies to petitions were filed by Atlantic Coast Line Railroad Company, Deposit Committee for First and Refunding Mortgage 5 percent Bonds, the Lynch interests, and Senator Claude Pepper.

Most of the petitions requested reopening for further argument or further hearing, or both. By order entered October 7, 1947, we reopened the proceeding for further consideration of the record and reargument.

The petitions and the arguments in support thereof were generally reiterations of contentions previously advanced in the proceeding,

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and repetition of our previous discussions in dealing with them is unwarranted. Lack of discussion in this report of any of the contentions readvanced in the petitions and arguments may be interpreted as indicating that we consider those contentions to have been adequately treated in our prior reports.

The factual record.—None of the important facts recited in our third supplemental report was challenged either by petition or on argument.

Counsel for the Board of County Commissioners of St. Johns County, Greater Miami Traffic Association, city of New Smyrna Beach, Jacksonville Chamber of Commerce and Jacksonville Traffic Bureau, and St. Lucie County and Fort Pierce, Fla., challenged the classification of public witnesses in our third supplemental report insofar as that classification distinguished between witnesses testifying in favor of Du Pont estate operation and control and witnesses testifying in favor of independent operation and control. None of those counsel challenged the fact that some of their witnesses testified in favor of independent operation and control without expressing preference for Du Pont estate operation and control, but, rather, argued that it was the intention of the witnesses to favor Du Pont estate operation and control even though not so specifying in their testimony.

That part of our third supplemental report dealing with the legality of the merger plan and our power to approve a plan of reorganization providing that, upon reorganization, the debtor's properties will be merged or consolidated with the Atlantic Coast Line Railroad Company was challenged by petition and on argument.

Legality of a plan of reorganization providing for merger of the debtor's properties with the Coast Line.—In our third supplemental report, we discussed our power under the statute to approve a plan transferring the debtor's property to the Coast Line, and concluded that such a plan would in all respects conform to the provisions of section 77, particularly subsections (b), (d), and (e), and would not transgress the priority rule as expressed in *Northern Pac. Ry. Co.* v. *Boyd*, 228 U. S. 483.

The opponents of the approved merger plan seek to read into subsection (b) language not contained therein. They suggest that the language "another corporation" in subparagraph (b) (5) means a corporation organized to carry out the plan. No such qualification is suggested by the language itself, and the statutory language must prevail. Had Congress intended to impose such a limitation on our power, the assumption is that it would have added the necessary language to make effective that restriction.

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The opponents of the approved merger plan also suggest that a merger such as referred to in subparagraph (b) (5) must be a voluntary merger, and resort was had to the congressional proceedings incident to the enactment of section 77 in an effort to substantiate that contention. Certainly the language of the statute does not so state. Where the language of a statute is plain and unqualified, that language must prevail. *Helvering* v. *City Bank Co.*, 296 U. S. 85.

The opponents of the approved merger plan seek to subordinate section 77 of the Bankruptcy Act to the Interstate Commerce Act. They point out that subsection (f) of section 77 provides that upon confirmation of a plan we shall grant authority "for the issue of any securities, assumption of obligations, transfer of any property, sale, consolidation or merger of the debtor's property, or pooling of traffic to the extent contemplated by the plan and not inconsistent with the provisions and purposes of Chapter I of Title 49". They contend that since the Interstate Commerce Act does not authorize us to require involuntary mergers our hands are likewise tied under the Bankruptcy Act. We do not agree with that contention. The quoted provision of subsection (f) of section 77 is not a limitation on the plan which we are authorized to approve under subsection (b). Nothing is said in subsection (b) nor in subsection (e) regarding the Interstate Commerce Act. When we reach this provision (subsection (f)) in the statute, all that is necessary to approve and confirm the plan has been provided for. The plan is then ready to be made effective. It would be strange for Congress, after giving us express authority to do certain things under the Bankruptcy Act in order to rehabilitate an insolvent carrier, to thereafter limit our authority by the express provision of the Interstate Commerce Act. The Interstate Commerce Act deals with solvent carriers and contains no machinery for dealing with bankrupts. Its "provisions and purposes" are not directed to the rehabilitation of insolvent railroads. To hold that our powers under the Bankruptcy Act to promulgate a plan of reorganization for a debtor corporation are subordinate to our powers under the Interstate Commerce Act would defeat the bankruptcy statute.

We construe the reference to the Interstate Commerce Act contained in subsection (f) of section 77 to mean that after the plan has been adopted by this Commission and the court, this Commission shall grant such additional authority as may be required to carry out the plan, observing the provisions of the Interstate Commerce Act where applicable, and the national transportation policy contained therein.

The language used in subsection (f) is "not inconsistent with." The approved merger plan is not inconsistent with the Interstate Commerce Act. There is no prohibition in the Interstate Commerce Act

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against the merger of an insolvent railroad with a solvent railroad. We may, pursuant to our power under section 77 of the Bankruptcy Act to deal with bankrupt railroads, promulgate a plan which provides that the bankrupt shall be merged with a solvent corporation, and the court which has jurisdiction of the bankrupt's property may confirm the plan. The solvent corporation here is willing. There is nothing in the Interstate Commerce Act to prohibit us from approving such a transaction.

As applied to this proceeding the argument that the word "merger," contained in subparagraph (b) (5) means a voluntary merger is beside the point. There is nothing of record to show that the merger of the Florida East Coast with the Atlantic Coast Line is objected to by either. The stockholders of the Florida East Coast have not objected. The objection comes from certain of its bondholders.

Any contention that the merger must be voluntary is nullified by the 1935 amendment to section 77, which provides, in subsection (e) that "if the plan has not been accepted by the creditors and stockholders, the judge may, nevertheless, confirm the plan over their objection." This provision is not restricted to any one of the several plans authorized in subsection (b). It refers to any plan authorized by that subsection. Subsection (b) specifically authorizes a plan which may provide for the merger of the debtor corporation with another corporation. Any involuntary aspects of such merger fade completely in the face of the power of the court to confirm the plan providing for such merger over the objection of creditors or stockholders.

Finally, the opponents of the approved merger plan insist that in order to effect transfer to the Coast Line there must be a foreclosure sale. It seems to be conceded by all that this Commission and the court have authority to sell the property at foreclosure and transfer it to the successful bidder, whether that bidder be the Coast Line, a system line, a stranger corporation or anyone else.

The reorganization statute does not direct a judicial sale and the decisions show that such a sale is not required. Here, it should be remembered that the reorganization statute was not designed solely for the benefit of creditors. "The Commission is charged with the development of a plan which must balance and choose between public and private interests." *Ecker* v. *Western Pac. R. Corp.*, 318 U. S. 448. "Once the property is in the hands of the court private rights as respect that *res* are subject to the superior dominion of the court and are to be adjudicated pursuant to the standards prescribed by the Congress." *Case* v. *Los Angeles Lbr. Products Co.*, 308 U. S. 106.

A railway is a unit; it can not be divided up and disposed of piecemeal like a stock of goods. It must be sold, if sold at all, as a unit and as a going concern. Its activities can not be halted because its continuous, uninterrupted operation is necessary in the public interest;" *Continental Bank* v. *Rock Island Ry. Co.*, 294 U. S. 648. "Investors or speculators in junior security issues, by their entry into a railroad enterprise, assumed the risk that in any depression or any reorganization the interests of the public would be considered as well as theirs." *Reconstruction Finance Corp.* v. *Denver & R. G. W. R. Co.*, 328 U. S. 95.

In the *Ecker* case the Court said:

> The amendments of 1935 were primarily designed to cure defects disclosed by practical experience. Both acts are bottomed upon the theory of debtor rehabilitation by adjustment of creditors' claims. Such treatment was essential for embarrassed railroads, as ordinary bankrupty liquidation or judicial sales were impossible because of the size of their indebtedness and the paucity of buyers.

In re New York, N. H. & H. R. Co., 16 Fed. Supp. 504, a dissenting creditor filed a petition in which he contended, among other things, that subsection (e), which provides for the confirmation of the plan over the objection of the creditors, was unconstitutional in that it failed to provide for a public judicial sale to protect dissenting creditors. The district court overruled that contention and, after discussing the question at considerable length, said:

> We are left then only with the question whether the challenged provision is unconstitutional in that it deprives creditors of a right, or supposed right, to have the value of their respective equities determined by a public judicial sale * * * I incline to the view that a District Court of the United States in a proper case may in the exercise of its inherent equity powers approve and enforce a plan of reorganization for a railroad without resort to the fiction of a judicial sale. That being so, it follows that the provision of subdivision (e) now under attack serves merely to confer upon the District Court in its bankruptcy part a power theretofore existing in its equity part. It is too late now to question the power of Congress to confer equity powers upon the bankruptcy court, and I hold the questioned provision to be valid and constitutional.

In the *Denver & Rio Grande* case, *supra*, (decided June 10, 1946, rehearing denied October 28, 1946), the Supreme Court specifically upheld the constitutionality of subsection (e). It said:

> We think that the provisions for confirmation by the court over the creditors' objection are within the bankruptcy powers of Congress. Those powers are adequate to eliminate claims by administrative valuations with judicial review and they are adequate to require creditors to acquiesce in a fair adjustment of their claims, so long as a creditor gets all the value of his lien and his share of any free assets.

The Court further said:

We see no more constitutional impediment to the elimination of claims against railroad debtors by the Interstate Commerce Commission's determination of values, with judicial review as to the sufficiency of the evidence and compliance with statutory standards, than we do to their elimination by an accepted bid in a depression market.

The statute does not require the plan to provide for a judicial sale. It does permit us to approve a plan which may provide for a sale at not less than a fair upset price, but that is optional and not mandatory, and was so held to be in *Old Colony Bondholders* v. *New York, N. H. & H. R. Co.*, 161 Fed. (2d) 413. The court said:

Because section 77, sub. b (5), 11 U. S. C. A., Sec. 205, sub. b (5), declares that a plan "shall provide adequate means for the execution of the plan, which may include * * * the sale of all or any part of the property of the debtor * * * at not less than a fair upset price," it is urged that the Commission was bound to set an upset price in dollars. But in our opinion the quoted provision is optional, not mandatory, as to any property which passes to the debtor or to the new reorganized company; indeed, there is some reason to suppose that it was interpolated in 1935 to provide against the possibility that the "cram-down" provision, also then introduced, might prove unconstitutional.

In that case a dissenting opinion in the circuit court voiced the thought that Congress did not intend to authorize a unification of a debtor and another railroad corporation not a part of the debtor's "system" unless there was a "sale at not less than a fair upset price," and that ground was strongly urged in petitions to the Supreme Court for certiorari, but the Supreme Court denied the writ.

The decisions cited convince us that in railroad reorganizations the "Commission's determination of values with judicial review as to the sufficiency of the evidence and compliance with statutory standards" is an adequate and legal substitute for the judicial sale. The *Ecker* case says plainly that the reorganization statute is bottomed upon the theory of debtor rehabilitation by adjustment of creditors' claims, and that this was essential in the case of embarrassed railroads "as ordinary bankruptcy liquidation or judicial sales were impossible because of the size of their indebtedness and the paucity of buyers." Our powers are adequate "to eliminate claims by administrative valuation," and "are adequate to require creditors to acquiesce in a fair adjustment of their claims, so long as a creditor gets all of the value of his lien," based upon our determination of the value of the property. If the creditors are not content with the plan, the court, under the provisions of the 1935 amendment, which have been held to be constitutional, may nevertheless confirm the plan over their objections. In none of the recent decisions has there been any finding or

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uggestion that a judicial sale is a requisite of the plan, other than he dissenting expression in the circuit court in the *Old Colony* case, vhich was not followed by the Supreme Court.

Summarizing, the approved merger plan complies with the requirements of section 77. It meets the requirements of subsection (b), is fair and equitable, and is compatible with the public interest. Nothing in the statute provides that the transferee corporation referred to in subsection (b) must be a corporation organized to carry out the plan; or must be a member of the debtor's system; or that the merger must be voluntary; or that there must be a foreclosure sale. On the other hand, the statute, without qualification, states that we may approve a plan which provides for "the merger or consolidation of the debtor with another corporation," and that the court may confirm that plan, even over the objection of dissenting creditors.

We conclude that the legality of the approved merger plan is affirmed by the language of the statute, and by the subsequent decisions of the courts, and that section 77 empowers this Commission and the court to execute the approved merger plan.

Adequacy of satisfaction of claims of first and refunding bondholders.—Question has been raised as to the adequacy of the satisfaction of the claim of the first and refunding bondholders under the approved merger plan when the value for reorganization purposes is stated in terms of par or stated value rather than actual, or market, value. In any reorganization "value for reorganization purposes" simply means "maximum permissible capitalization," and not the quick worth of the property as measured by market appraisal of the value of securities representing that capitalization. Maximum permissible capitalization is expressed in terms of par or stated value, and in no reorganization do the securities issued immediately command on the market, prices approaching par. Many of the reorganization securities now on the market are selling for prices representing only fractions of par. It is contended that value for reorganization purposes should have a different meaning when creditors are required to accept securities of another company than when they are given the right to operate the property themselves and to recoup their losses from future operations. If we were to venture into the speculative field of comparison of probable market values, the logical comparison would be that of the probable market value of the securities to be issued in the reorganization with the market's appraisal of the worth of the property as expressed in prices of securities now representing that property. The debtor's first and refunding bonds recently (March 11, 1948) sold on the New York Stock Exchange for 57,

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which means market-appraised value of the $45,000,000 bond issue now representing the property of $25,650,000, contrasted with the value for reorganization purposes of $40,500,000.

The valuation of $40,500,000 is not intended to represent worth of the property such as would be determined by an inventory of the physical assets. As in all reorganization cases, in this proceeding we found the normal future annual earnings which might reasonably be expected (in this instance $1,500,000), then determined the amount of debt which such earnings can service, allowing some residue for return to stockholders. Value for reorganization purposes, physical value, and market value, are each entirely different, and we can concern ourselves only with the first.

The requirement that the plan be fair and equitable is satisfied if the creditors of the debtor receive Coast Line securities which are the equitable equivalent of the securities which they would receive under an independent reorganization of the debtor. *Group of Institutional Investors* v. *Chicago, M., St. P. & P. R. Co.*, 318 U. S. 523, 565.

Under the approved plan, the debtor's bondholders will have a substantial voting interest in the Coast Line stock. Their interest will amount to 15.38 of all Coast Line stock. This stock ownership will secure to these bondholders a substantial participation in net income earned by the Coast Line in the future. In view of our finding that the Coast Line's future operating prospects are more favorable and bear promise of being more stable than those of the debtor under independent operation, it is our opinion that these bondholders, through their ownership of Coast Line securities to be allocated to them, will have a better opportunity of recouping the losses which they will sustain in the reorganization than if they were to control and manage the debtor's property as an independent carrier without the support of a strong trunk-line carrier of proven financial stability.

In any event, the securities to be issued under the approved merger plan could be converted into an immediate profit of handsome proportions by the majority bondholder (St. Joe Paper Company) probably the next largest bondholder (Lynch interests) and, in fact, all of the bondholders except those relatively few (only one of which has come before us in this proceeding) who purchased their holdings in the solvent days of the railroad. Counsel for the Coast Line presented at the argument a summary containing an appendix which included an obviously conservative estimate of the quick market values of the securities to be issued under the approved merger plan. That estimate, adjusted to reflect current lower price of Coast Line common stock (46¾) on March 11, 1948, becomes:

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	Per $1,000 first and refunding bond		
	Allotment, par or stated value	Estimated market price	Total estimated market value
Cash	$91.67	100	$91.67
First-mortgage bonds	300.00	90	270.00
Income bonds	175.00	70	122.50
Preferred stock	200.00	70	140.00
Common stock	133.33	46¾	62.33
Total	900.00		686.50

It does not seem necessary to adjust this estimate of market values of the bonds and preferred stock, since the values used appear to be conservative in the light of market prices commanded by the Coast Line's present bond issues.

The total estimated market value of the cash and securities to be allotted to a $1,000 bond of $686.50 produces total value for the entire $45,000,000 issue of $30,892,500, which compares with current market value of the first and refunding bond issue, at price of 57, of $25,650,000.

In the same appendix to his summary of argument, counsel for Coast Line undertook to estimate the profit which St. Joe could realize based on estimated net cost of $2,594,340 for St. Joe's present holdings of $25,100,000. Counsel for Coast Line challenged the St. Joe Paper Company to say that the estimate of cost was not over-estimated, and since such challenge was not met, we assume that the estimate is either overstated or substantially correct. On basis of market value per distributive share of $686.50 per $1,000 bond, St. Joe could, assuming that market price, realize for its holdings some $17,230,000, or profit of about $14,635,000.

The next largest bondholder probably is the Lynch interests, with present holdings understood by their counsel to be something over $3,000,000. Counsel for Coast Line stated that because of subsequent interest distributions and profits on bonds sold, the present average net cost of the holdings of the Lynch interests is zero or minus. Counsel for the Lynch interests disclaimed knowledge as to the amount of investment in the bonds. Accepting the unrefuted statement that the net basis is not more than zero, the quick market value of the securities to be distributed to the Lynch interests would be all profit, which, at $686.50 per $1,000 bond, would aggregate about $2,060,000.

Reference has been made to the claim of the first and refunding bonds to December 31, 1946, being nearly $84,000,000. That claim in that amount was made up of principal amount of the bonds, interest in default, and interest on defaulted interest, or so-called penalty interest. Since that date, one defaulted interest coupon has been paid and three more have accrued, with interest subsequent to the March 1,

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1933, coupon now being in default. The present claim is therefore $45,000,000 principal amount, 15 years of interest in default, or $33,750,000, plus possible penalty interest, the allowance of which is questionable.

The majority bondholder and most of the other bondholders purchased their holdings since equity receivership proceedings were instituted in 1931, and therefore purchased them at a "flat" price, which did not take into account the defaulted interest coupons annexed to the bonds. The purchase price acquired the principal amount of the bonds; the additional "claim" represented by the defaulted interest coupons was an additional element obviously regarded by both seller and purchaser as then without value.

Stating the present claim as $45,000,000 principal amount and $33,750,000 defaulted interest, or aggregate of $78,750,000 without allowing for possible addition of penalty interest, St. Joe Paper Company, as owner of $25,100,000 principal amount of bonds, has claim of $43,925,000, acquired, as hereinbefore indicated, at probable net cost of $2,594,340 or less. The Lynch interests' $3,000,000 principal amount represents claim of $5,250,000, in which the present investment is probably nothing or less.

Both St. Joe and the Lynch interests, also many of the remaining bondholders, acquired at least the majority of their present holdings before wartime earnings permitted the payment of any of the defaulted interest coupons, and the four coupons subsequently paid may be described only as a windfall which has served to reduce present net investment to very small proportions.

This proceeding is a most unusual one in that, contrary to the situation in the ordinary reorganization in bankruptcy, the preponderance of the creditors, instead of suffering losses, will reap substantial profits. That the claim of the first and refunding bondholders will under the approved plan be adequately satisfied is obvious.

Capitalization.—In our second supplemental report, we reviewed the debtor's earnings available for payment of fixed charges, years 1916–43, inclusive, and the first 6 months of 1944, and in our third supplemental report we reviewed results for the years 1944 and 1945. Since issuance of the latter report, the record has been supplemented by income statements of the debtor (which were received into the record by stipulation) for the years 1946 and 1947. For those years, results were:

	1947	1946	Increase or decrease
Railway operating revenues	$27,054,334	$26,543,488	$510,846 (increase).
Railway operating expenses	23,683,284	20,721,821	2,961,463 (increase).
Income available for fixed charges	1,696,540	4,533,531	2,836,991 (decrease).

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While railway operating revenues increased, 1947 compared with 1946, by $510,846, that increase was affected by general rate increases. If 1947 be compared with 1945, the decrease in railway operating revenues is $2,516,673 and, compared with 1944, $4,675,868.

Railway operating expenses increased, 147 compared with 1946, $2,961,463, of which increase $984,471 represented an extraordinary retirement charge for service value of nondepreciable property of the Okeechobee branch over which operations were discontinued April 1, 1947. Operating expenses for 1947 were $3,108,347 greater than for 1945, and $4,627,473 greater than for 1944.

Income available for fixed charges for 1947 of $1,696,540 reflects certain adjustments, two of which were major in effect, namely, the extraordinary retirement charge applicable to the Okeechobee branch, and credit to Federal income tax accruals of $1,400,000, representing estimated recovery of Federal income and excess-profits taxes account carry back of 1947 net operating loss.

If those two major adjustments, which are opposite in effect, be eliminated from income available for fixed charges for year 1947, the result is $1,281,011.

In our second supplemental report, we reviewed in some detail the various estimates of prospective earnings available for fixed charges in a normal year, as a result of which review we found that $1,500,000 represented a fair estimate, so far as could be foreseen, of the debtor's probable annual income available for payment of interest in a normal year, assuming completion of the program of extraordinary additions and betterments.

In our third supplemental report, the uncertainties which will attend the future operating experience of the debtor were again mentioned, and findings made that the record did not justify increase in estimate of future normal year income, which estimate was based on the assumption of completion of the rehabilitation and improvement program, and after consideration of the economies of operation that might reasonably be expected to result therefrom.

Since the issuance of both the second and third supplemental reports, the trend in railway operating revenues has been generally downward, except for small increase, 1947 over 1946, attributable in part to general rate increases. The trend of railway operating expenses has been generally upward.

The trends of both revenues and expenses serve to emphasize the uncertainties attendant upon the future operating experience of the debtor referred to in previous reports. Income available for fixed charges for year 1947, after elimination of the extraordinary adjustments cited, falls somewhat below the amount of $1,500,000 previously

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found to be a fair normal year estimate. While the decline in operating revenues may be expected to be partially overcome in 1948 as result of additional general rate increases recently authorized, the record subsequent to our previous reports contains no justification for upward revision of the previous estimate of $1,500,000 as future normal year income, so far as can be foreseen.

In our second supplemental report, after capitalizing on various bases the $1,500,000 of probable normal year earnings available for payment of interest, we found that the value of the debtor's property for the purposes of the reorganization is $40,500,000 exclusive of the amount of equipment obligations outstanding, which finding was reaffirmed in our third supplemental report. Since the record contains no justification for revision of the previous estimate of probable normal year earnings, there likewise is no justification for revision of the previous finding of the value of the debtor's property for purposes of reorganization.

In any year in which the estimate of $1,500,000 may be realized, all charges, both contingent as well as fixed, under the plan approved in our second supplemental report and order, would be covered 1.21 times. All additional charges of the Coast Line under the merger plan approved in our third supplemental report and order before preferred stock dividends, would be covered 1.64 times.

Except for the fact that under an independent reorganization the creditors would receive the entire equity in the reorganized company, the distributive share under the merger plan approved in our third supplemental report would represent greater satisfaction of the claims of creditors than would the distributive share of the same capitalization under an independent reorganization. As discussed in our third supplemental report and under the circumstances therein cited, the annual return to existing first and refunding bondholders might be greater under the plan outlined in our second supplemental report for independent operation in periods of moderate prosperity, while in periods of average or low earnings the reverse would be true. On argument, counsel for Coast Line distributed a summary of argument containing, as an appendix, a comparison intended to test the relative treatment of the first and refunding mortgage bondholders under the approved merger plan and under a plan for an independent reorganization such as was approved in our second supplemental report and order. The test was based upon reported results of both Coast Line and the debtor for 12 months ended October 31, 1947, with adjustments for certain extraordinary and nonrecurring income and expense items. The result showed, without taking into consideration the cash payment of $4,125,000 to be made by the Coast Line under the approved merger plan, more favorable treatment of present first

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nd refunding bondholders under the approved merger plan in an-
ual return per distributive share. That comparison was not chal-
enged, except that counsel for the Lynch interests, protested that
ertain additional adjustments should have been made. Those addi-
ional adjustments would apply equally to the results under the ap-
proved merger plan and under a plan for independent reorganization,
with one exception, and the relative showing would be unchanged.
The one exception is that counsel for the Lynch interests contended
that the results under the approved merger plan should be adjusted
to include operating economies expected to result from the merger,
which would have widened the differential of more favorable treat-
ment under the approved merger plan.

Summarizing, the record does not justify revision in the previous estimate of future normal year income, in the value for reorganization purposes, or maximum permissible capitalization, previously found, nor in the finding that the approved merger plan meets the requirement of fair and equitable satisfaction of the claims of the debtor's first and refunding bondholders.

Proposals of the Lynch interests.—In our third supplemental report, we discussed the proposals of the Lynch interests for increase in value of the debtor's properties. Counsel for the Lynch interests reiterated at the argument the contention previously advanced, that the estimate of $1,500,000 as normal future year earnings is too low.

The estimate of normal future year endings is attacked by the Lynch interests as failing to reflect changed conditions since the earlier hearings; failing to reflect savings to result from the improvement and rehabilitation program, failing to reflect savings from elimination of much of the Okeechobee branch and substitution of the Fort Pierce cut-off, and failing to reflect improvement in current assets position.

The Lynch interests also contend that, in the event of merger with the Coast Line, the estimate of normal future year earnings should be revised upward to include the proportion which should be allocated to the debtor (claimed by the Lynch interests as one-half) of the savings to result from unification.

Estimates of normal future year income submitted by the Lynch interests range from $1,947,000, testified to by witness Gordon at the further hearing in 1945, to $3,644,000, stated by counsel for the Lynch interests at the January 1948 argument as the normal estimated net available for year 1947 after numerous adjustments.

Based upon the contention that estimated normal future year earnings are understated, the Lynch interests are contending for a finding of value for reorganization purposes and, therefore, maximum permissible capitalization of $48,000,000, exclusive of equipment obli-

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gations. At the argument, counsel for the Lynch interests referred to its briefs having asked for capitalization consisting of $12,000,000 first-mortgage bonds, $12,000,000 income bonds, $12,000,000 preferred stock, and the equity, or common stocks, stated at $12,000,000, a total of $48,000,000. That make-up of the suggested capitalization of $48,000,000 is not entirely in accord with supplement to petition of the Lynch interests filed July 19, 1947, which asked that, if a plan for independent operation be approved, the capitalization of $48,000,000 sought be made up of at least $24,000,000 of bonds, of which $12,000,000 should bear fixed interest and $12,000,000 contingent interest, at least $13,500,000 of preferred stock, and 210,000 shares of no-par common stock at stated value of $50 per share. ($10,500,000.)

The Lynch interests further contend that in the event of merger with the Coast Line, the suggested capitalization of $48,000,000 should be increased by an unspecified amount to reflect a fair proportion of unification savings, and further, that additional cash should be paid by the Coast Line over and above that provided in the third supplemental report and order to cover the cost of additions and betterments not provided for in the cash reserve of the third supplemental report and order.

There has heretofore been discussed the prospective earning capacity of the debtor, particularly in the light of recent results, and conclusion reached that no upward revision in the estimate of future normal year earnings is justified by the record. The estimate of future normal year earnings takes into consideration savings to result from the improvement and rehabilitation program, stated in our second supplemental report. The estimate of $1,500,000 was reached after assuming completion of the program of extraordinary additions and betterments described in that report, which is the same program discussed in the third supplemental report without expansion on that program.

In contending that the estimate of normal future year earnings should be revised to take into account a fair proportion allocated to the debtor of the savings from unification under the merger plan, the Lynch interests fail to take into account the showing made by the Coast Line that the unification savings claimed by the Coast Line are eventual savings to be gradually attained in the future, and not savings which will result immediately upon consummation of the merger.

Counsel for the Lynch interests appear to assume in their petition for modification and upon oral argument that the permissible capitalization of $40,500,000 was based upon applying a capitalization rate to normal year earnings of $1,500,000 found by us in our report to be a reasonable forecast. Counsel contend that the rate of capi-

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talization of such earnings used by us is too high and disproportionately so compared to that used by us in other reorganization proceedings. A similar contention was advanced in *Rutland R. Co. Reorganization*, 267 I. C. C. 153, and what we said in our report in that case is equally appropriate here.

In that report we said in part:

> The petitioner's insistence that a capitalization rate of approximately 3 percent should be applied to its estimate of prospective earnings places too great reliance upon a purely mechanical method of fixing the capitalization of the reorganized company. As the division stated in its report, the ratio of probable earnings to approved capitalization is informative but, since it does not reflect all matters considered in the determination, it is not conclusive. In the ultimate analysis, that determination involves an element of judgment, predicated on a full consideration of all relevant facts and is not reducible to a mere arithmetical formula.

Because there is nothing in the record to justify an increase in the estimate of future normal year earnings, there is nothing to justify increase in the value for reorganization purposes or maximum permissible capitalization on that account.

Additions and betterments not provided for in cash reserve.—In their petitions for modification and upon oral argument, several counsel for parties in interest urged that some provision additional to that provided for in the plan should be made to reimburse the debtor's first and refunding mortgage bondholders for the use already made and that which will be made prior to consummation of the plan, of cash in the hands of the debtor's trustees and used by them pursuant to court order for extraordinary additions and betterments and improvements additional to those for which cash is to be reserved under the approved plan. As to the improvements included in the program, the value of the debtor's property as fixed by us contemplates a completion of the program.

The court, by orders entered July 17 and 25, 1947, recognized this problem in approving expenditures totaling $1,470,242 by the debtor's trustees for improvements additional to those included in the rehabilitation program. In its orders approving such expenditures, the court inserted a provision that the funds shall, when used, be deemed to have been advanced by, and for the account of, the debtor's first and refunding mortgage bondholders, who shall be reimbursed therefor, and that to secure such reimbursement the holders of such bonds shall have a lien upon the cash and property of the debtor corporation to the extent of the sums so advanced and expended for such improvements, such lien to be subject only to the lien of the debtor's first-mortgage bonds and to be superior to any interest in the property acquired through reorganization.

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We cannot know at this time the extent to which the cash, properly belonging to the debtor's first and refunding bondholders, may be so used by the trustees of the debtor prior to consummation of the approved plan. In view of the court's recognition of the question involved, we will leave to the court a determination, as of the date of consummation of the plan, of the extent of the lien and the manner in which it shall be evidenced upon consummation of the plan to the extent not then satisfied.

Petition of New York Trust Company.—In our third supplemental report we found that three items of assets [2] concerning which a controversy had developed, represent property of such nature as was intended to be included within the after-acquired property clauses of the debtor's mortgages, and therefore could not be considered as free assets available for part satisfaction of the debtor's unsecured claims. Recognizing, however, that in the last analysis, determination of the rather close question involved lies within the jurisdiction of the courts, we implemented the plan by finding the value of these assets so that the plan could be consummated regardless of the action taken by the court.

The New York Trust Company, trustee under the defaulted equipment trust series D, an unsecured creditor for the unsatisfied portion of its claim under the trust, the lease having been disaffirmed, contends that our finding that these assets are covered by the after-acquired property clauses of the mortgages is erroneous, in view of the fact that the mortgages make no specific mention of the items in their granting clauses. It asks that we refrain from making any finding on this issue, leaving it for determination solely by the court, but that if any finding is made, it should be to the effect that the assets are free and not subject to the lien of the mortgages.

In our third supplemental report we discussed the various provisions of the mortgages. We also pointed out that the assets in question were considered by counsel for the debtor's trustees to be subject to the liens of the mortgages, and that in litigation with State authorities involving taxation of these and other assets, definite assertions have been made to the effect that they were subject to such liens. In view of this background of interpretation of the mortgages, and recognizing that our decision is in no way binding upon the court, we conclude that no change should be made in our previous finding. The petition of the New York Trust Company will be denied.

Conclusion.—Upon further consideration, we conclude that all petitions for modification of the third supplemental report and order

[2] The controversial assets consist of:
2960 shares, $100 par value stock of Fruit Growers Express Co.
7497 shares, $100 par value stock of Peninsular and Occidental Steamship Co.
Advances of $22,999.02 by debtor to Railway Express Agency, Inc.

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April 8, 1947, approving a modified plan of reorganization for the
rida East Coast Railway Company pursuant to section 77 of the
nkruptcy Act as amended, should be, and they are hereby, denied,
l the conclusions and findings in our third supplemental report,
I. C. C. 295, are affirmed.
An appropriate supplemental order will be entered.

HAFFIE, Commissioner, dissenting:
The *Boyd* case was decided April 28, 1913 (*Northern Pac. Ry. Co.
Boyd*, 228 U. S. 482). In it the Court reaffirmed what is generally
own as the strict priority rule. Under that rule a junior creditor
stockholder cannot benefit from assets being administered in bank-
ptcy proceedings unless all claims having priority are first fully
isfied. That principle has been consistently followed in subse-
ent decisions. I think it applicable here. And that if it be applied
acquisition now sought by the Atlantic Coast Line cannot be ap-
oved. As I pointed out in my dissent from the prior report, the
preme Court in *Insurance Group Committee* v. *Denver & R. G. W. R.*
., 329 U. S. 607, decided February 3, 1947, spelled out for us the re-
irements as to the adequacy of compensation for prior claims as
llows:

Until it can be contended with some show of reasonableness that the creditors
ior to the creditors and stockholders whom the debtor represents here have
eived more in value than the face of their claims, the debtor's insistence
a reexamination of the plan is without substantial support. See *Northern
cific Ry. Co.* v. *Boyd*, 228 U. S. 482; *Group of Investors* v. *Milwaukee R. Co.*,
U. S. 523, 541.

Here the Atlantic Coast Line is an applicant seeking to acquire the
ilroad property being reorganized. It is certainly in no more fa-
red position than would be the holder of a junior claim or a stock-
lder. The creditors under the plan now approved receive much less
n value than the face of their claims." The report relies on the
eory that the creditors are entitled to receive only the equivalent
the face amount of reorganization securities as fixed by us, which
uivalent may be, and in this instance is, very much less in market
lue than either the face of the claims or the value of the property
r reorganization purposes as found by this Commission. The latter
gure is $40,500,000. This is based on the Commission's estimate of
rmal future earnings and is sometimes described as the capitalizable
lue of the property. The effect of the finding is that securities of
at total amount may properly be issued in the reorganization. The
port attributes to the Coast Line securities to be paid for the prop-
ty a value of approximately $31,000,000. The question presented

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is whether the persons who normally would be entitled to receive the $40,500,000 of securities found by us to be properly issuable, and the resulting control of the property, may be required to give up that control and to accept instead Atlantic Coast Line securities having a value much less than that amount. On this point the holding of the Supreme Court in the *Boyd* case, *supra*, is of interest:

> If the value of the road justifies the issuance of stock in exchange for old shares, the creditors were entitled to the benefit of that value, whether it was present or prospective, for dividends or only for purposes of control. In either event it was a right of property out of which the creditors were entitled to be paid before the stockholders could retain it for any purpose whatever. (Page 508.)

The *Boyd* principle is the authoritative test of what is fair and equitable. It is difficult to see how it can be subordinated, as seems to be done in the report, to the Commission's finding of what is required by the public interest. It should be remembered that the "fair and equitable" finding is required to be made not only by us but also by the court. Apparently to buttress the public interest finding the report adopts a novel theory as to what treatment legally satisfies a prior claim. After discussing at some length the prices paid by some of the security holders for some of their holdings and their possible profits on such holdings, the conclusion is reached that "the preponderance of the creditors, instead of suffering losses, will reap substantial profits." It is then found "That the claim of the First and Refunding bondholders will under the approved plan be adequately satisfied is obvious." This remarkable finding seems to be based on an appendix attached to the summary of the argument of counsel for the Coast Line. It is not of record in this proceeding. And even if the facts stated in it were proven they would not afford a valid basis for the finding above set out.

As to the public interest finding on which the report is principally grounded, I reiterate what I said in my separate expression referred to above. The record as I view it supports independent ownership and operation by local people rather than acquisition by the Coast Line as being in the public interest. The report should so find. The representations of the persons served by the railroad, of those employed by it or otherwise dependent on it for a livelihood, and of the owners of its securities all have to be disregarded rather completely in order to arrive at the conclusion as to the public interest which the report reaches.

I would vacate the order of April 8, 1947, and approve a plan substantially in accordance with that recommended by the examiner.

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hat would permit the property to be reorganized. The report now sued is more likely merely to prolong the controversy.

I am authorized to state that CHAIRMAN LEE and COMMISSIONERS ILLER, SPLAWN, and MITCHELL join in this expression.

COMMISSIONER JOHNSON participated in the disposition of this ase.

APPENDIX

Supplemental order at a General Session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 25th day of March A. D. 1948

It appearing, That this Commission, on April 8, 1947, made and filed its third supplemental report and entered its third supplemental order in this proceeding, 267 I. C. C. 295, approving a plan of reorganization of Florida East Coast Railway Company, debtor, pursuant to section 77 of the Bankruptcy Act, as amended, 11 U. S. Code, section 205;

It further appearing, That petitions for modification of the approved plan were filed by St. Joe Paper Company, the Lynch interests, E. N. Claughton, F. K. Conn, Southern Railway System, Seaboard Air Line Railroad Company, Railway Labor Executives' Association, Brotherhood of Railroad Trainmen, Jacksonville Chamber of Commerce and Jacksonville Traffic Bureau, Miami Chamber of Commerce and Greater Miami Traffic Association, city of New Smyrna Beach, city of Fort Pierce and St. Lucie County, Board of County Commissioners of St. Johns County, and New York Trust Company;

It further appearing, That, upon further consideration, this Commission, upon the date hereof, made and filed its supplemental report containing its findings of fact and conclusions thereon, which report is hereby referred to and made a part hereof;

It is ordered, That the aforesaid petitions for modification of the report and order of April 8, 1947, be, and they are hereby, denied.

Third supplemental order at a general session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 8th day of April, A. D., 1947

It appearing, That this Commission, on January 8, 1945, made and filed its second supplemental report and entered its second supplemental order in this proceeding, 261 I. C. C. 151, approving a plan of reorganization of the Florida East Coast Railway Company, debtor, that plan being a modification of the plan approved by this Commission, division 4, by report and order of April 6, 1942, 252 I. C. C. 423, as modified by supplemental report and order of this Commission of August 10, 1942, 252 I. C. C. 731.

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It further appearing, That the proceedings were reopened and a further hearing held and this Commission, upon the date hereof, made and filed its third supplemental report containing its findings of fact and conclusions thereon, which report, together with the previous reports of April 6 and August 10, 1942, and January 8, 1945, is hereby referred to and made a part hereof, in which report of even date herewith it has approved certain further modifications in the plan of reorganization of the debtor previously approved by this Commission:

It is ordered, That the following modified plan of reorganization of the debtor be, and it is hereby, approved:

I. EFFECTIVE DATE OF THE PLAN

The effective date of the plan shall be fixed by the reorganization managers with the approval of the court, provided that the effective date shall be approximately the date of consummation of the plan and, in no event, earlier than 6 months prior thereto, insofar as the reorganization managers at the time of fixing of the date, with the approval of the court, may be able to determine. All the new securities shall be dated as of the effective date.

II. TRANSFER OF THE DEBTOR'S PROPERTIES TO ATLANTIC COAST LINE RAILROAD COMPANY

On the consummation date of the plan all the business, assets, franchises, and property of every kind and character, real, personal, and mixed, constituting the estate of the debtor, and all right, title, and interest of the trustees of the debtor's estate therein, shall be vested in the Atlantic Coast Line Railroad Company by merger of the debtor into, or consolidation of the debtor with, the Atlantic Coast Line Railroad Company, or, if the court shall approve, by transfer and conveyance by the said trustees of the property of the debtor to the Atlantic Coast Line Railroad Company.

III. PROTECTION OF THE INTERESTS OF EMPLOYEES

The authorization herein granted for the acquisition by the Atlantic Coast Line Railroad Company of the properties of the debtor is upon the conditions (in addition to the other conditions stated) that during the period of 4 years from the date of this order such transaction will not result in employees of the carrier or carriers by railroad affected by such order being in a worse position with respect to their employment, except that the protection afforded to any employee pursuant to this section of the order shall not be required to continue for a longer period, following the date of this order than the period during which such employee was in the employ of such carrier or carriers prior to the date of this order, provided, however, that nothing in this provision shall bar the Atlantic Coast Line Railroad Company and authorized representatives of employees of the carriers from entering into agreements for the protection of the interests of the employees.

IV. MAINTENANCE OF EXISTING JOINT THROUGH ROUTES

All existing through routes via Jacksonville, Fla., to and from points now served by the debtor in connection with Seaboard Air Line Railroad Company and Southern Railway system shall be kept open.

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V. DISCHARGE OF CLAIMS

On the consummation date of the plan the debtor shall be discharged from all its obligations other than claims to be paid or to be assumed as hereinafter in this plan provided, and all mortgage bonds, notes, certificates and shares of stock, and other claims against the debtor or its property, other than as aforesaid, shall, on and after the consummation date, become void and unenforceable against the debtor or the Atlantic Coast Line Railroad Company or the property of either of them.

VI. CASH RESERVES

The reorganization managers shall set aside in a separate fund out of the debtor's cash on hand a sum of not less than $10,725,551 as a reserve to be expended, as directed by the court, for cash requirements upon reorganization and for the improvements and betterments to the property of the debtor specified in the reports of this Commission which are made a part hereof. There shall be credited to such reserve fund any cash expended for such purposes by the trustees of the estate of the debtor upon order of the court, and any part of such fund which may not have been so expended or appropriated at the date of consummation of the plan shall be taken over and held as a separate fund by the Atlantic Coast Line Railroad Company to be segregated from its other funds, to be expended exclusively for such purposes upon order of its board of directors.

If, at the time of appointment of the reorganization managers, the tax liability of the debtor in the amount of $3,438,370 with respect to deductions by the debtor from Federal income taxes in former years of interest upon delinquent interest on the debtor's obligations shall not have been finally determined, or, if finally determined, shall not have been paid, or, if the tax liability shall have been determined to be a lesser sum and shall not have been paid, then such amount of $3,438,370 or any lesser sum finally determined to be payable, shall be set aside in a further separate fund by the reorganization managers and they shall allot to the existing first and refunding mortgage bondholders of the debtor evidences of a right to receive, in addition to any other distribution made to them upon consummation of the plan, a pro rata distribution of the portion of the reserve, if any, not required to be paid in final satisfaction of any such tax liability, such distribution of cash to be made immediately following the final determination of the amount, if any, of such tax liability. The reorganization managers shall have the authority, with approval of the court, to determine the form in which the existing first and refunding mortgage bondholders' rights to such distribution shall be evidenced.

VII. CASH DISTRIBUTIONS

Any and all excess cash in the treasury of the debtor, as of date of consummation of the plan, which the court shall find was earned prior to the date of consummation of the plan and is not reasonably necessary for any of the purposes for which cash shall be used or reserved under the terms of the plan, shall upon order of the court entered prior to the entering of the order directing consummation of the plan, be distributed pro rata to the holders of the debtor's first and refunding mortgage bonds and shall be deemed to constitute part satisfaction of their claims additional to the treatment accorded them by the plan herein approved.

VIII. UNDISTURBED SECURITIES

The Atlantic Coast Line Railroad Company shall assume all outstanding equipment obligations of the debtor and of the debtor's trustees. The interests of the

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holders of claims evidenced by all such equipment obligations will not be materially and adversely affected by the plan.

IX. NEW CAPITALIZATION

The Atlantic Coast Line Railroad Company, upon consummation of the plan and upon its acquisition of the properties of the debtor, shall issue the following securities in connection with such acquisition, the securities so specified being in addition to the assumption by the Atlantic Coast Line Railroad Company of equipment obligations of the debtor and of the debtor's trustees pursuant to section VIII hereof:

Issue	*Amount*
Atlantic Coast Line Railroad Company divisional first-mortgage fixed-interest 3½-percent 25-year bonds	$13,500,000
Atlantic Coast Line Railroad Company divisional income 4¼-percent 75-year bonds	7,875,000
Atlantic Coast Line Railroad Company participating cumulative $100 par-value 4-percent dividend preferred stock	9,000,000
Atlantic Coast Line Railroad Company no-par common stock (stated at $100 per share)	6,000,000
Total	36,375,000

The Atlantic Coast Line Railroad Company shall further, on or before the date of consummation of the plan, pay to the reorganization managers the sum of $4,125,000 out of its cash on hand, such sum to be distributed by the reorganization managers to the debtor's first and refunding mortgage bondholders as provided hereinafter in section XIV hereof.

X. DIVISIONAL FIRST MORTGAGE BONDS

The divisional first mortgage bonds shall be obligations of the Atlantic Coast Line Railroad Company. They shall bear fixed interest at the rate of 3½ percent per annum, payable on July 1 and January 1, shall be dated as of the effective date of the plan and shall mature 25 years after their date of issue. The total authorized issue shall be limited to $13,500,000.

The divisional first-mortgage bonds shall be secured by a direct first lien on all the debtor's property except its cash, accounts receivable, and such other current assets as are not customarily subject to the liens of railroad mortgages, and its assets not necessary for the operation of the railroad and as may be specified in the mortgage, such lien to be subject only to any liens on equipment and any prior charges described in the following section hereof. The first mortgage shall also have a first lien on all property acquired in replacement of any property originally mortgaged, and, in such manner and with such exceptions as may be provided in the mortgage with the approval of the court and this Commission, on all other such property which may be appurtenant to the liens of railroad originally mortgaged.

The new divisional first-mortgage bonds shall be redeemable in whole or in part at any time on 30 days' notice at their principal amount and accrued interest plus a premium of 2 percent if redeemed during the first 9 years, such premium decreasing by one-eighth of 1 percent on the first day of the tenth year and of each succeeding year so that there will be no premium on redemption in the last year prior to maturity, except that the bonds will be redeemable for the sinking

id at their principal amount plus accrued interest. Any redemption of less
in all of the bonds shall be by lot. The divisional first mortgage shall provide
· a sinking fund for the bonds, the annual payments to be equal to one-half of
percent of the largest principal amount of bonds at any time previously
thenticated and delivered. Sinking-fund payments shall be applied to the
irement of divisional first-mortgage bonds by purchase in open market (at a
t to the sinking fund not exceeding their redemption price) or by redemption,
ept that not more than $25,000 may be permitted to accumulate in the sinking
id at any time when it is impossible to purchase divisional first-mortgage
nds or their redemption price or less. All bonds acquired for the fund shall be
ained in the sinking fund and interest paid thereon to the same extent as if the
nds were outstanding, such payments of interest into the sinking fund on such
nds to be additional to the regular sinking-fund payments.

The first mortgage shall provide, within conditions and limits to be therein
scribed, for the modification and alteration thereof and of any or all supple-
nts thereto and of the rights and obligations of the Atlantic Coast Line Rail-
id Company and of the holders of the bonds issued thereunder, at any time,
the concurrent action of the Atlantic Coast Line Railroad Company and of
holders of not less than 66⅔ percent of the aggregate principal amount of
nds then outstanding affected by such change or modification; and such modi-
ation or alteration may specifically include procedural provision for ascer-
ning available net income without the maintenance of separate books of
count, in the event the Atlantic Coast Line Railroad Company should be
rged into or consolidated or unified with another corporation whether or not
ubsidiary of the Atlantic Coast Line Railroad Company; provided, however,
t no such change or modification shall (*a*) alter or impair the obligation of the
antic Coast Line Railroad Company with respect to the determination and
plication of income available for interest on the first-mortgage bonds (except
herein specifically provided) or with respect to payment of the principal of
interest on any first-mortgage bonds at the time and place and at the rate
l in the currency provided therein, or (*b*) permit the creation by the Atlantic
ast Line Railroad Company of any mortgage or lien in the nature of a mort-
ge ranking prior to, or on a parity with, the lien of the first mortgage, except
in the first mortgage otherwise expressly provided, or (*c*) modify, without
s Commission's approval, the provisions of any sinking fund for debt retire-
nt provided for in this plan. Provision shall be made whereby bondholders
y vote at such meeting by proxy. Notwithstanding the limitation of clause
of this paragraph, the divisional first mortgage shall contain a provision in
h form and substance as may be determined by the reorganization managers
h the approval of the court, that the mortgage may at any time, with the
proval of this Commission or such other regulatory body as may at the time
e jurisdiction in the premises, be modified by the concurrent action of the
antic Coast Line Railroad Company and of the holders of not less than 75
cent in principal amount of all bonds of the mortgage outstanding at the time
such vote so as to postpone the time or times of payment of any vested interest
ier before or after the interest is due, or the principal of any or all bonds of
mortgage, either before or after maturity, which at such time may be
standing, provided that the payment of the principal of the bonds may not be
tponed for a longer period than 20 years from the maturity date designated
he bonds and that the maturity of interest on the bonds may not be postponed
a longer period than 5 years, but in no event beyond the maturity date of the

principal of the bonds designated in the bonds, unless such maturity be postponed, in which event the maturity of interest on the bonds may not be postponed beyond the extended maturity date of the principal.

XI. DIVISIONAL INCOME BONDS

The divisional income mortgage bonds shall be obligations of the Atlantic Coast Line Railroad Company, shall bear contingent interest at the rate of 4¼ percent per annum, payable as, and cumulative to the extent, hereinafter provided, shall be dated as of the effective date of the plan and shall mature 75 years after their date of issue.

The total authorized issue shall be limited to $7,875,000 principal amount.

The divisional income mortgage bonds shall be redeemable in whole or in part at any time on 30 days' notice at their principal amount and accrued interest. Accrued interest shall include any interest payable but not paid with respect to the available net income of the next preceding calendar year and all unpaid accumulated interest (provided that the maximum payable with respect to accumulated unearned interest shall not exceed the maximum hereinafter specified), plus interest at 4¼ percent per annum from the last preceding December 31 to the redemption date. Any redemption of less than all of the bonds, whether at the option of the obligor or for the sinking fund, shall be by lot. Contingent interest on the divisional income mortgage bonds at the rate of 4¼ percent per annum shall (up to the limit of accumulation hereinafter specified, become owing as a debt on December 31 in each year, if, and to the extent, that the available net income (as defined in article XIII hereof shall suffice therefor, except that interest at the rate of 4¼ percent for the year prior to maturity of the bonds shall be paid at date of maturity of the bonds whether or not earned. Otherwise interest, if the available net income shall suffice therefor, shall be payable on May 1 of the year next succeeding or thereafter as hereinafter provided. Unearned interest shall accumulate up to a maximum amount of 12¾ percent, but no more. If such maximum accumulation is reached, no further accumulation shall be made unless the amount of the accumulated interest is later reduced, in which case unearned interest accruing after such reduction in accumulated interest may again be accumulated from time to time, but the total accumulation of unearned interest shall never exceed the maximum of 12¾ percent.

Accumulated interest shall be mandatorily payable on May 1 of any subsequent year (*a*) whenever and to the extent that the balance of the available net income of the preceding calendar year after provision for the interest on the divisional mortgage bonds payable on such May 1 shall suffice therefor, or (*b*) in any event (whether earned or not) at the maturity or on the redemption of the bonds.

The Atlantic Coast Line Railroad Company may at any time at its discretion pay, out of any funds lawfully available therefor, any interest due or accrued on the bonds, even if not earned.

No interest shall be paid on the bonds in any year if the amount shall be less than one-fourth of 1 percent, and all payments shall be in multiples of one-fourth of 1 percent. Any available net income not applied because of the foregoing provision shall be reserved and added to the available net income applicable to the payment of interest on the bonds and to the sinking fund in the succeeding calendar year or years.

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The divisional income mortgage shall provide for annual payments into a sinking fund for the bonds, equal to one-half of 1 percent of the largest principal amount of bonds at any time previously authenticated and delivered, such payments to be made if sufficient available net income for the previous year is available for such purpose under the provisions of the subdivision hereinafter included in this plan entitled "Determination and Application of Available Net Income." Such sinking fund shall be applied to the retirement of bonds by purchase in the open market or by call for tender (but in no case at a price exceeding their principal amount and accrued interest) and to the extent not so applied, to their redemption as herein provided. Bonds shall be called for redemption by lot. All bonds acquired for the fund shall be retained in the sinking fund and interest paid thereon to the same extent as if the bonds were outstanding, such payments of interest into the sinking fund on such bonds to be additional to the regular sinking-fund payments.

The divisional income mortgage shall also contain provisions for its modification and other features similar to those contained in the divisional first mortgage.

The divisional income mortgage shall be secured by a lien on all the property of the debtor, including after-acquired property, which is subject to the lien of the divisional first mortgage, the lien of the divisional income mortgage to be subject only to the lien of the divisional first mortgage.

XI (a). PREFERRED STOCK

The New Atlantic Coast Line Railroad Company preferred stock shall have a par value of $100 per share.

The holders of the preferred stock shall be entitled to receive, when and as declared by the board of directors of the Atlantic Coast Line Railroad Company, dividends of $1 a share on February 1, May 1, August 1, and November 1 in each year commencing with the year in which the reorganization of the debtor shall be consummated. The holders of the new preferred stock shall also participate share for share with the holders of the Atlantic Coast Line Railroad Company common stock in all dividends paid or set aside for payment on the common stock in excess of $4 per share per annum thereon. Dividends on the new preferred stock shall be cumulative to the extent of 12 percent whether or not earned in any year of such accumulation but thereafter only to the extent earned but not declared or paid. In determining the amount of accumulation of dividends at any time, no dividends paid or set aside for payment upon the new preferred stock in any year previous to the first year of such accumulation in excess of $4 shall be credited against the nonpayment of the $4 dividend in any subsequent year.

So long as there shall be any accumulated dividends on the new preferred stock, no distribution whatever, whether by dividends or otherwise, shall be declared, or set aside for payment, or paid upon the common stock of the Atlantic Coast Line Railroad Company, and no common stock of the Atlantic Coast Line Railroad Company shall be purchased or redeemed.

The new preferred stock shall be redeemable as a whole or in part by lot, at any time on at least 30 days' notice at $100 a share plus (1) the amount of any accumulated dividends within the limit of accumulation herein specified and (2) an amount equal to interest at 4 percent per annum from the last preceding dividend-payment date to the date of redemption. Holders of the new preferred stock shall be entitled to one vote per share in the election of directors of the Atlantic Coast Line Railroad Company except that the holders of the new preferred stock voting as a class shall have the right to elect not less than

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2 directors in the event of the default of the equivalent of six quarterly dividends. The Atlantic Coast Line Railroad Company shall not, without the consent or vote of the holders of at least two-thirds in par value of the outstanding new preferred stock create any stock ranking, either as to assets or dividends, in priority to or on a parity with the new preferred stock. The affirmative approval of the holders of at least two-thirds of the new preferred stock, shall be a prerequisite to any charter or bylaw amendment of the Atlantic Coast Line Railroad Company altering materially any existing provisions of such preferred stock.

In the event of the dissolution, winding up, liquidation, or reorganization of the Atlantic Coast Line Railroad Company, the holders of the new preferred stock shall be entitled to receive the par value of their shares and accumulated dividends (within the maximum herein specified) before any distribution shall be made to the holders of Atlantic Coast Line Railroad common stock and shall not be entitled to share further in any assets of the Atlantic Coast Line Railroad Company.

XII. NEW COMMON STOCK

The common stock issuable in the reorganization shall be the common stock of the Atlantic Coast Line Railroad Company outstanding on May 1, 1947, or the equivalent thereof in the event of any stock dividends, split-ups or the issuance of any rights subsequent to May 1, 1947. If the date of the consummation of the plan shall be prior to the date as of which holders of such common stock will receive payment of a dividend on the common stock previously declared, a cash adjustment shall be made to the holders of the common stock allocable in this reorganization.

XIII. DETERMINATION AND APPLICATION OF AVAILABLE NET INCOME

Available net income of the Atlantic Coast Line Railroad Company for the purposes of this plan shall be determined for each calendar year beginning with the calendar year in which the plan shall be consummated (except that the first period may be less than a calendar year in the event the plan shall be consummated on some date other than January 1), on or before May 1 of the following year.

Available net income for each year shall be determined by deducting all fixed charges of the Atlantic Coast Line Railroad Company (including the sinking-fund payment for retirement of the new divisional first-mortgage bonds) accruing in such year from the Atlantic Coast Line Railroad Company's balance available for fixed charges for such year (determined in accordance with this Commission's accounting rules or those of any other governmental agency having jurisdiction in the premises at the time in effect, or, to the extent not governed by such accounting rules, in accordance with sound accounting practices).

Available net income shall be determined for each year as the accounts are stated on the books of the Atlantic Coast Line Railroad Company when its accounts are closed for such period, without adjustments, except that (1) if in respect to any year the available net income is a deficit, the amount of such deficit shall be carried forward and be deducted in determining available net income for the succeeding year or years until such deficit (or accumulated or remaining deficits) be extinguished by earnings, which, in the absence of such

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deficit or deficits, would be available net income; and (2) any adjustments necessary to correct the income accounts of any prior year shall be made by appropriate entries which may either be made in the accounts of the current year or, in the discretion of the board of directors of the Atlantic Coast Line Railroad Company and subject to the approval of this Commission or that of such other governmental agency, if any, as at the time may have jurisdiction over the accounting practices of the Atlantic Coast Line Railroad Company, may be made, in whole or in part, in the accounts of any subsequent year or years, and any such debits or credits made in the accounts of any year to adjust entries in the the income account of prior years shall be treated as income items for the year in which entered on the books, whether cleared through income or profit and loss accounts; and (3) in computing such available net income, no amounts shall be deducted for retirements of nondepreciable property.

Available net income for each year shall be applied, to the extent necessary, to the following purposes and in the following order:

(*a*) To the payment of currently payable interest on the divisional income mortgage bonds.

(*b*) To the payment of accumulations of interests on the divisional income mortgage bonds.

(*c*) To the current sinking-fund payment on the divisional income mortgage bonds.

(*d*) To payments into the sinking fund to the extent of the difference, if any, between the amounts paid in prior years and the amounts which would have been payable if the available net income in prior years had sufficed for payments of $39,375 a year.

(*e*) To any proper corporate purpose of the Atlantic Coast Line Railroad Company (except dividends on its common stock) including, if and to the extent that such dividends are declared by the directors, the payment of dividends on Atlantic Coast Line Railroad Company preferred stock, including the payment of 4-percent dividends upon the new preferred stock (issued in this reorganization proceeding) in respect to such year and of any accrued and unpaid cumulative dividends on the new preferred stock.

(*f*) To any proper corporate purpose of the Atlantic Coast Line Railroad Company, including, if and to the extent that such dividends are declared by the directors, the payment of dividends upon the common stock of the Atlantic Coast Line Railroad Company to a maximum amount of $4 per share but only after all accrued and unpaid cumulative dividends upon the preferred stock have been paid or set aside for payment.

(*g*) To any proper corporate purpose of the Atlantic Coast Line Railroad Company including, if, and to the extent that such dividends are declared by the directors, the payment of additional dividends equally on a share-for-share basis on the new preferred stock issued in this reorganization proceeding and on the common stock of the Atlantic Coast Line Railroad Company.

The divisional income mortgage shall provide that in the event of a consolidation, merger, conveyance, or lease involving the Atlantic Coast Line Railroad Company a separate income account shall not thereafter be required in respect to the operation of the property subject to the lien of the mortgage and shall specify, or provide for the determination of, an equitable method of ascertaining what portion or portions of the revenues and expenses of any successor or lessee corporation shall be used for the determination and application of available net income under the mortgage.

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XIV. TREATMENT OF EXISTING SECURITIES AND CLAIMS

Upon consummation of the plan or prior thereto if the court should order, holders of the debtor's first-mortgage 4½-percent bonds, due June 1, 1959, shall receive for each $1,000, principal amount, of bonds held, cash in the full principal amount plus all accrued and unpaid interest to date of payment of the principal. When so paid the interests of these bondholders will not be materially and adversely affected by the plan.

Holders of the debtor's first and refunding mortgage 5-percent bonds, series A, shall receive for each $1,000 principal amount, of bonds held and all accrued and unpaid interest to the effective date of the plan, approximately $91.67 of cash payable by the Atlantic Coast Line Railroad Company out of its own cash on hand, $300, principal amount, of new Atlantic Coast Line Railroad Company divisional fixed-interest 3½-percent 25-year first-mortgage bonds, $175, principal amount, of Atlantic Coast Line Railroad Company divisional 4¼-percent 75-year divisional income mortgage bonds, $200, par amount, of new Atlantic Coast Line Railroad Company participating cumulative $4 preferred stock, 1.33 shares of Atlantic Coast Line Railroad Company common stock, and a ratable share of all cash of the debtor in the possession of the debtor's trustees which may be distributed upon consummation of the plan in accordance with the provisions for cash distribution hereinbefore stated.

The interests or equities of (1) holders of unsecured claims against the debtor not entitled to priority over one or more of the mortgages of the debtor and (2) holders of the capital stock of the debtor, have no value and nothing shall be distributed to them in the reorganization.

If, however, the court shall find that there are assets of the debtor not subject to the liens of its existing mortgages of sufficient value to be practicable of apportionment among the holders of unsecured claims against the debtor, using in such determination the values of the assets as fixed by this Commission, then in such case there shall be applied toward satisfaction of the total amount of allowed unsecured claims, determined as hereinafter specified, a sufficient amount of the entire issue of $13,500,000 of divisional first-mortgage bonds at their principal amount and such number of the 60,000 shares of Atlantic Coast Line Railroad Company common stock distributable in this reorganization at a stated value of $100 per share as will together on a basis of one-half bonds and one-half stock equal the total value of such assets so found by the court to be not subject to the liens of the debtor's existing mortgages, less the amount of cash paid in settlement or part settlement of the claims of unsecured creditors as hereinafter provided in this section.

The divisional first-mortgage bonds and shares of common stock which, in such event, are to be applied toward satisfaction of allowed unsecured claims, shall be ratably distributed among the holders of such claims, the total amount of which shall comprise the amount of allowed general unsecured claims plus the amount of any deficiency claim allowed by the court on the first and refunding mortgage of the debtor.

Holders of allowed general unsecured claims of less than $100 in amount may, in such event, be paid cash in satisfaction of their claims, the amounts of cash so to be paid to be in the same proportion to the total of the claims so paid, as the total value of the new securities receivable by the other holders of unsecured claims (with the divisional first-mortgage bonds taken at face value and the Atlantic Coast Line common stock at $100 per share) shall bear to the total amount of their claims.

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The Atlantic Coast Line Railroad Company in connection with any settlements of transportation accounts between the United States and the debtor, shall be required to recognize and pay or allow for any and all sums determined through audit, adjustment, compromise, or litigation, as due the United States by virtue of the provisions of section 322 of the Transportation Act of 1940, 54 Stat. L. 955, for payments made prior to the date of confirmation of a plan of reorganization, without requiring proof thereof in this reorganization proceeding and without prejudice by reason of such sums not having been proved herein, with the same relative priority as they now have with respect to other obligations of the debtor.

XV. CLAIMS NOT AFFECTED BY PLAN

The following claims to the extent allowed are not affected by the plan: (*a*) Claims arising from the administration of the trust estate and operation of the property subsequent to the filing of the petition under section 77 of the Bankruptcy Act, as amended, on January 25, 1941; (*b*) obligations of the receivers incurred in the receivership proceeding between the time of appointment of the receivers on August 31, 1931 and the filing on January 25, 1941, of the petition under section 77 of the Bankrupty Act, as amended, and reasonable administrative expenses, and allowances in that proceeding, to the extent that provision shall be made therefor by the court in the present proceedings; (*c*) claims entitled to priority over one or more of the mortgages of the debtor, including labor claims entitled to such priority; (*d*) claims for taxes and special assessments; (*e*) claims for interest and principal, provision for payment of which has been made by the debtor or by the court, but which have not been paid because not presented for payment. To the extent that such claims, liabilities, or obligations are not paid by the debtor or the trustees of the estate of the debtor pursuant to order of the court in the reorganization proceeding, they shall be assumed by the Atlantic Coast Line Railroad Company and paid in cash in due course, provided that any amounts of the foregoing classes (*a*) to (*e*), inclusive, assumed by the Atlantic Coast Line Railroad Company shall constitute a charge upon the property securing the new divisional mortgages, such charge to be prior in lien to such new divisional mortgages. All such claims, liabilities, and obligations may be adjusted or compromised and dealt with or paid or discharged by the Atlantic Coast Line Railroad Company, all as may be determined by its board of directors. In view of the above provisions, the interests of the holders of such claims of the foregoing classes (*a*) to (*e*), inclusive, against the debtor will not be materially and adversely affected by the plan.

XVI. EXPENSES OF REORGANIZATION

All costs of administration of the trustees of the debtor and all expenses of reorganization, including the amounts of all claims for compensation and expenses allowed pursuant to section 77 of the Bankruptcy Act, shall be paid in cash.

XVII. ASSUMPTION OR DISAFFIRMANCE OF LEASES OR CONTRACTS

The Atlantic Coast Line Railroad Company shall assume such of the contracts of the debtor which are executory in whole or in part, including any executory leases and liabilities under guaranties as shall have been affirmed by the trustees of the estate of the debtor in the reorganization proceeding with the approval of the court, and also any executory contracts made by the trustees of the estate of the debtor with the approval of the court in the reorganization proceeding

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which, by their terms, do not terminate at the conclusion of the reorganization proceeding. When such contracts are assumed by the Atlantic Coast Line Railroad Company, the interests of the other parties to such contracts will not be materially and adversely affected by the plan.

XVIII. LISTING OF THE NEW SECURITIES ON THE STOCK EXCHANGE

The reorganization managers or the board of directors of the Atlantic Coast Line Railroad Company shall, upon the issuance of the new securities, or if practicable prior thereto, cause the filing promptly of an application for the listing of the new securities on the New York Stock Exchange.

XIX. REORGANIZATION MANAGERS

The reorganization managers shall not be more than three in number, all to be appointed by the court, and shall carry out the plan under the supervision and control of the court. The reorganization managers shall have general supervision of carrying out the plan.

The reorganization managers shall have, subject to any requirements of law and requisite approval of the court and this Commission, full and plenary discretionary power to take all such action and to enter into such arrangements, financial and otherwise, as they may deem necessary or advisable, in order to consummate and carry into execution the plan or any modification thereof; to fix the compensation of persons whose services they may employ in the execution of their powers; to supervise the transfer of the debtor's properties to the Atlantic Coast Line Railroad Company; to determine the form and provisions, so far as not otherwise herein specifically provided, of the new bonds and the mortgages under which the same shall be issued, the new preferred-stock certificates and any other instruments deemed by the reorganization managers to be necessary or proper in connection with the plan; and to do all other acts in their discretion advisable for carrying out the plan. All fees and expenses of the reorganization managers shall be payable out of the estate of the debtor upon order of the court, within maximum limits to be fixed by this Commission.

The court shall, however, before they are put in use, approve the new mortgages, trust agreements, bonds, securities, and preferred-stock certificates.

The reorganization managers may act by a majority as from time to time constituted, at a meeting or in writing without a meeting. They may employ such agents, attorneys, and others as they may deem desirable for the purposes of the plan. They may from time to time delegate to others any power or discretion conferred upon them by the plan, and they shall not be liable for any action taken or omitted by them in good faith or by any person employed by them in good faith, except for their respective individual malfeasance or willful neglect.

The reorganization managers shall not be authorized to solicit deposits of securities for purposes other than exchange or to solicit authorizations to represent security holders, except upon approval by this Commission of the terms of such solicitation, pursuant to section 77 (p) of the Bankruptcy Act.

XX. ACCEPTANCE OF THE PLAN, PARTICIPATION THEREIN AND EXECUTION THEREOF

Acceptance of the plan shall include acceptance of the new bonds, mortgages, stock certificates, and all instruments necessary and appropriate to the carrying out of the plan, other than the orders of the court and this Commission, to the same effect, as though the terms of such instruments were set out in full in the plan.

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The method by which creditors and other parties in interest may, after confirmation of the plan by the court, participate therein shall be determined by the reorganization managers, with the approval of the court, and notice thereof duly given.

XXI. NOTICE AND CONSTRUCTION OF PLAN

Unless otherwise provided in section 77 of the Bankruptcy Act, as amended, or by any order or orders of the court in the reorganization proceeding or of this Commission, whenever notice shall be required or permitted to be given under or pursuant to the plan, such notice shall be given by publishing a copy thereof once in each week for two consecutive weeks in one newspaper published and of general circulation in the city of Jacksonville, Fla., and in one newspaper published and of general circulation in the city of Miami, Fla., and also (1) in case of notice to security holders who have accepted the plan, by mailing such notice, postage prepaid, to the addresses of such security holders set forth in the acceptances signed by them, and (2) in case of notices to security holders who shall not have accepted the plan, by mailing such notices, postage prepaid, to such security holders whose names and addresses are available, but failure to mail any such notices, or delay in mailing any such notices, shall not invalidate the notice by publication above provided, which alone shall be held sufficient.

The construction of the plan by the court shall be final and conclusive. The court shall have the power to cure any defect, supply any omission, or reconcile any inconsistency, in such manner or to such extent as may be necessary or expedient in order to carry out the plan effectively.

It is further ordered, That the authorizations and approval herein granted by this Commission are upon the condition that the journal entries covering the necessary accounting adjustments under the order will be submitted to this Commission for approval before they are recorded on the books of the Atlantic Coast Line Railroad Company under the plan of reorganization herein approved.

It is further ordered, That nothing herein contained shall be, or be construed as, a grant of authority for the issue of any securities, assumption of obligations, transfer of any property, sale, consolidation, or merger of the debtor's properties, or pooling of traffic, pursuant to either the Bankruptcy Act or the Interstate Commerce Act, until further action by this Commission upon confirmation of the plan by the court.

It is further ordered, That except as otherwise decided in the aforesaid reports, all petitions for modification of the reports and orders of April 6, 1942, August 10, 1942, and January 8, 1945, and all petitions heretofore made or filed in this proceeding, be, and they are hereby, denied.

It is further ordered, That the orders entered herein on April 6, 1942, August 10, 1942, and January 8, 1945, be, and they are hereby, revoked and superseded.

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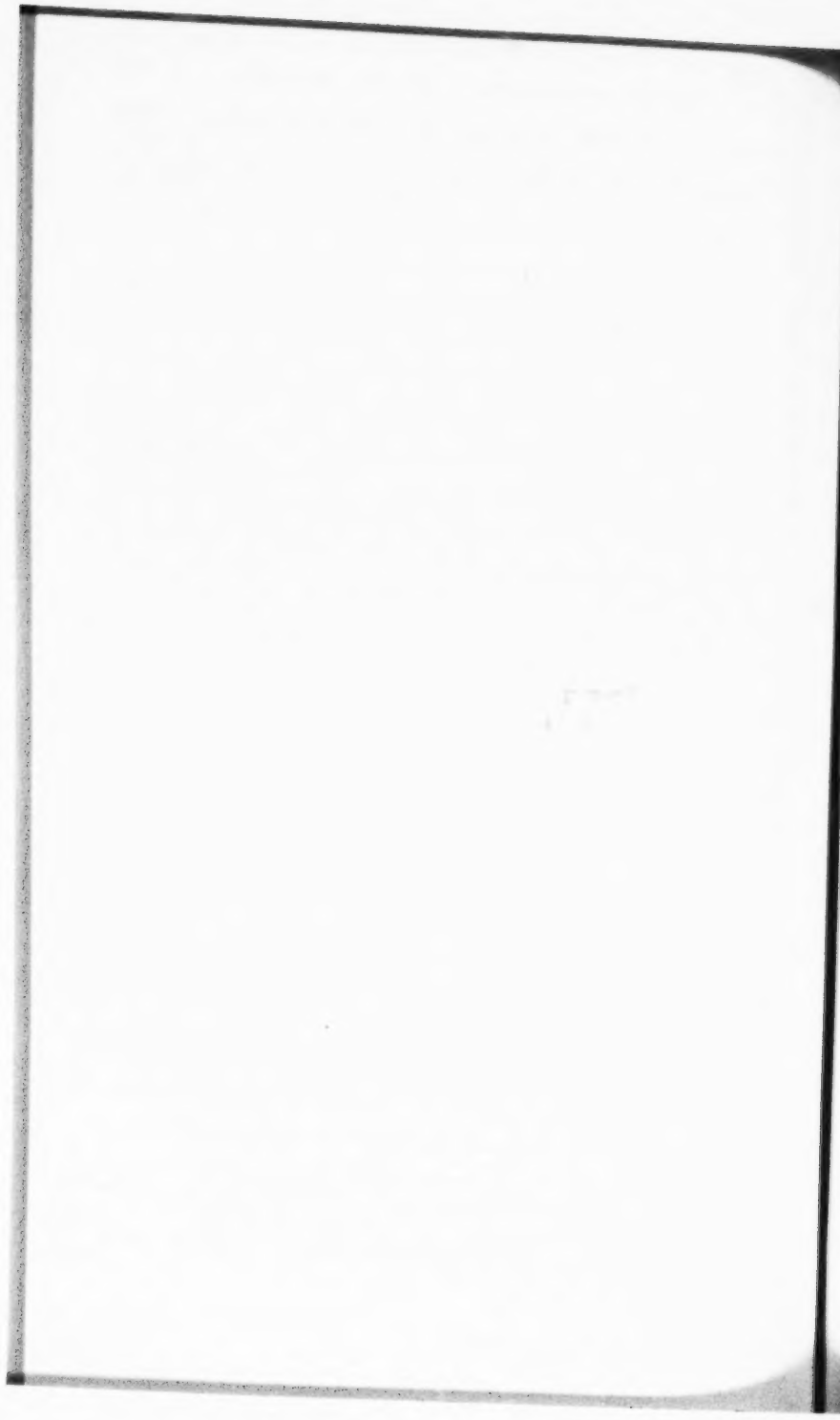

Order Fixing Time Within Which Objections to Plan of Reorganization and Claims for Expenses and Fees Incident to Reorganization, May Be Filed.

IN THE

District Court of the United States

FOR THE SOUTHERN DISTRICT OF FLORIDA.

In Proceedings for the Reorganization of a Railroad.

IN THE MATTER *of* FLORIDA EAST COAST RAILWAY COMPANY, Debtor.	No. 4827-J.

The Interstate Commerce Commission having by its Third Supplemental report and order dated April 8, 1947 (Doc. 578; 267 ICC 295), in the matter of Florida East Coast Railway Company Reorganization, Finance Docket No. 13170, approved a modified plan of reorganization for the debtor, and having by its Fourth Supplemental report and order dated March 25, 1948 (Doc. 636) affirmed the finding and conclusions of said Third Supplemental report and order and denied all petitions for modification thereof; and which modified plan, together with a transcript of the proceedings before the Commission and copies of said reports and orders, were certified to this Court under the seal of said Commission, and are now on file herein,

NOW, THEREFORE, pursuant to the provisions of subsections (e) and (c) (8) of Section 77 of the Federal Bankruptcy Act, as amended, on the Court's own motion it is hereby ORDERED:

Order Fixing Time Within Which Objections to Plan of Reorganization, etc.

1. Any and all parties in interest, whether they may have intervened herein or become formal parties to the record of this proceeding or not, who have any objections to said modified plan of reorganization, shall file in writing, in triplicate, detailed and specific objections thereto, and their claims, if any, for equitable treatment, in the office of the Clerk of this Court, in the City of Jacksonville, Florida, on or before July 1st, 1948, and the Clerk of this Court is hereby directed to furnish to the Trustees herein, or their attorneys, one copy of each of said objections or claims so filed. Objecting parties and claimants for equitable treatment shall also mail a copy of their objections or claims by registered mail to, or serve a copy of the same on, counsel of record for each and every party to this cause.

2. Any corporation, individual, or group of individuals having any claims for expenses or fees incident to reorganization of the debtor shall file the same in the form of a petition in writing, in triplicate, giving a detailed and specific account of the services so rendered or expenses so incurred to and including May 15th, 1948, in the office of the Clerk of this Court, in the City of Jacksonville, Florida, on or before June 15th, 1948, and the Clerk of the Court upon the filing of such petition shall forthwith forward one of the copies thereof to the Interstate Commerce Commission for the fixing of a maximum limit with respect to the amounts to be allowed for such expenses or fees, and shall furnish another copy thereof to the Trustees herein or their counsel. Such claim, if filed by any corporation, individual, or group of individuals, having already filed claim pursuant to the Court's order of February 12, 1945 (Doc. 441) shall cover only the period subsequent to that embraced in the claim already filed; and if filed by any corporation, individual, or group of individuals not having heretofore filed

claim, the same shall be only for the period subsequent February 15, 1945.

3. Scott M. Loftin and John W. Martin, Trustees erein, be and they are hereby directed to give notice of his order and of all the provisions thereof to the debtor, he Interstate Commerce Commission, and each and every rustee named in any mortgage or other instrument of secuity securing any of the debtor's bonds, notes, equipment trust certificates or other obligations, including obligations of guaranty, and to each and every other party o this cause, by mailing a copy of this order by registered mail to each of the foregoing or by service of a copy of this order on counsel of record in this proceeding for any of the foregoing.

4. The Trustees be and they are hereby directed to give notice of this order and of all of the provisions thereof to all stockholders and creditors of the debtor and all other parties in interest by publishing the same in full in one daily newspaper of general circulation in each of the cities of Jacksonville, Florida, Miami, Florida, and New York, New York. Said publications to be made once each week for two consecutive weeks, the first of said publications to be made not later than May 10th, 1948.

5. The Trustees shall file in these proceedings proper proof of the serving of copies of this order and of the publication thereof as herein directed.

DONE AND ORDERED at Jacksonville, Florida, this 29th day of April, 1948.

(Signed) LOUIE W. STRUM,
District Judge.

Endorsed

"Filed April 29, 1948, Jacksonville, Fla.
Edwin R. Williams, Clerk."

Order Fixing Date for Hearing on Plan of Reorganization.

IN THE

DISTRICT COURT OF THE UNITED STATES,

FOR THE SOUTHERN DISTRICT OF FLORIDA.

In Proceedings for the Reorganization of a Railroad

IN THE MATTER

of

FLORIDA EAST COAST RAILWAY COMPANY,

Debtor.

No. 4827-J.

The Interstate Commerce Commission, having certified to this Court a modified Plan of Reorganization, to which objections, claims for equitable treatment, petition to set aside and annul, and motion to refer back to Commission, have been filed, it is upon consideration thereof,

ORDERED AND ADJUDGED:

1. That said Petition and Motion shall be treated by the Court as objections to the plan, based upon the grounds stated in said Motion and Petition.

2. All objections to said Plan, including the Motion and Petition mentioned, and claims for equitable treatment, are hereby set down for argument at Jacksonville, Florida, beginning on Monday, January 10, 1949 at 10:00 o'clock A. M., at which time the Court will hear all parties in interest in support of, and in opposition to, such objections to the Plan and such claims for equitable treatment.

The Petition for Prepayment of First Mortgage 4½% Bonds, Petition of St. Joe Paper Company (filed July 30, 1948) for entry of Orders imposing lien in favor of First

and Refunding Mortgage bondholders, Petitions for Allowances for Fees and Expenses Incident to Reorganization, and all undisposed of Petitions for Leave to Intervene, now on file herein, are likewise set for hearing at same time and place.

3. Scott M. Loftin and John W. Martin, Trustees herein, be and they are hereby directed to give notice of this Order and of all the provisions thereof to the Debtor, the Interstate Commerce Commission, and each and every Trustee named in any mortgage or other instrument securing any of the Debtor's bonds, notes or other obligations, including obligations of guaranty, and to each and every other party to this cause, by mailing a copy of this Order to each of the foregoing or by service of copy of this Order on counsel of record in this proceeding for any of the foregoing.

4. The Trustees be and they are hereby directed to give notice of this Order and of all the provisions thereof to all stockholders, bondholders and creditors of the Debtor and all other parties in interest by publishing the same in full in one daily newspaper of general circulation in each of the cities of Jacksonville, Florida, Miami, Florida, and New York, New York; said publications to be made once each week for two consecutive weeks, beginning not less than thirty days prior to said hearing date.

5. The Trustees shall file in these proceedings proper proof of the serving of copies of this Order and of the publication thereof as herein directed.

DONE AND ORDERED at Jacksonville, Florida, this 11th day of October, 1948.

(Signed) LOUIE W. STRUM,
Chief Judge.

Endorsed:
"Filed Oct. 11, 1948,
Jacksonville, Fla.,
Edwin R. Williams, Clerk."

Order of the Honorable Joseph C. Hutcheson, Jr., Chief Judge of the Fifth Circuit, Dated November 17, 1948, and Filed November 22, 1948.

UNITED STATES OF AMERICA,

FIFTH JUDICIAL CIRCUIT.

Filed: Nov. 22, 1948.

WHEREAS, in the judgment of the undersigned, the public interest requires the designation and appointment of a Circuit Judge to hold the District Court of the United States for the Southern District of Florida;

NOW, THEREFORE, I, JOSEPH C. HUTCHESON, JR., Chief Judge of the Fifth Circuit, now present in said Circuit, do hereby designate and appoint the Honorable Samuel H. Sibley, United States Circuit Judge for the Fifth Circuit, to hold the District Court of the United States for the Southern District of Florida, in place or in aid of the judges of said District, and to have and exercise within said District the same powers that are vested in the judges thereof, pursuant to statutes in such case provided, for the period beginning January 10, 1949 and ending February 10, 1949, both inclusive.

WITNESS MY HAND at Ft. Worth, Texas, this the 17th day of November, 1948.

/s/ JOSEPH C. HUTCHESON, JR.
United States Circuit Judge.

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Objections to the Reports and Orders of the Interstate Commerce Commission dated April 8th, 1947 and March 25th, 1948.

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF FLORIDA.

In Proceedings for the Reorganization of a Railroad.

IN THE MATTER *of* FLORIDA EAST COAST RAILWAY COMPANY, Debtor.	No. 4827-J.

St. Joe Paper Company, a Corporation, owner of more than Fifty Percent of the First and Refunding Bonds of the Florida East Coast Railway Company, Bankrupt, pursuant to the Order of this Court dated April 29th, 1948, files the following objections to the approval of the Reports and Orders of the Interstate Commerce Commission purporting to be a Plan of Reorganization for the Bankrupt.

I.

The Orders of the Interstate Commerce Commission dated the 8th of April, 1947 and March 25th, 1948, and its Third and Fourth Supplemental Reports constitute an illegal exercise of power conferred upon it by law.

An error of law that underlies the Report of the majority is its assertion of power in the Commission to "merge an insolvent railroad with a solvent one" despite the opposition of more than 70% of the holders of First and Refunding Bonds that are secured by a lien upon all the prop-

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erty of the Debtor and upon the cash accumulated in the hands of the Trustees from earnings during operation by the Court because, as it says, the stockholders of the Debtor (who have no interest in said properties) have not objected. The Orders would require a transfer or sale of property and of earnings from operation to Atlantic Coast Line Railroad Company free from the lien of the mortgage without payment of the amount due to the bondholders secured thereby, at a superficial value, which value includes both property and cash; they fix a "Cash upset price" of $40,500,000 yet permit payment of over Thirty-five Million Dollars of that amount in securities worth millions of dollars less than their stated value; they prohibit the holders of bonds from exercising a right expressly given them by the mortgage securing the bonds to bid for the property—a right guaranteed by the law and Constitution of Florida; and impliedly prohibit the Court from receiving and considering bids of other parties or from exercising its inherent power to control a judicial sale.

The statute did not authorize the Commission to sell or offer to sell the property, nor to arbitrarily compel a sale or transfer at a stated or fictitious price on terms arbitrarily fixed by it to meet an offer made to it by a party, nor to accomplish this result by embodying such illegal provisions in Reports and Orders and calling them a Plan of Reorganization of the Bankrupt.

If Sec. 205, Chapter 8, Title XI, U. S. C. A. (Sec. 77 of the Bankruptcy Act) be so construed, it is void as a violation of the Constitutions of Florida and of the United States since it constitutes a taking of property without due process of law, an impairment of the contract rights of the mortgagee and its bondholders, and a taking of their property for the benefit of another—no decree or finding having been made that a taking is necessary in the public interest, no judgment fixing the value of the property taken having been entered in a suit against the legal and equitable

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owners for that purpose where payment is not required to be made in cash.

II.

The Commission has not, as it asserts in its Fourth Report, provided for the merger of an insolvent railroad with a solvent railroad, nor for a merger of the Debtor corporation with another corporation which the statute declares may be a means for the execution of a Plan of Reorganization. It provides only for a transfer of the title or a sale of the property of the insolvent railroad and of cash earnings from operation of the Debtor under Court control, upon both of which First and Refunding Bonds have a vested lien, without payment in full of the bonds secured thereby (superior to all other claims except the First Mortgage), against the express will of the great majority of the holders thereof.

III.

The Orders of the Commission dated April 8, 1947, and March 25th, 1948, are illegal because they would require the Court to approve the transfer of property of the Bankrupt and cash earnings of the Railway to Atlantic Coast Line Railroad Company whose sole interest therein is that of an assignee of two unsecured claims. Both of those claims are subordinate to the claims of all other creditors, secured and unsecured, including the unsecured claim of First and Refunding bondholders for a deficiency. Under the rule of absolute priority, Atlantic Coast Line Railroad Company, as assignee of these subordinate claims, cannot become the owner of the properties of the Debtor or obtain any equity or interest therein, (except as the result of a judicial sale) without paying in full the amount due on the lien of the First and Refunding Bonds which are secured by a mortgage the amount of which exceeds the value of the property plus the net earnings available for distribution to Bondholders,

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without diminishing to that extent the values available for satisfaction of the liens and claims of the Bondholders, who cannot be coerced to consent to release or surrender their rights to Coast Line by orders purporting to be a Plan of Reorganization without violating Constitutional provisions for due process.

IV.

This Court by its Order of October 19, 1943, and its Orders of July 17th and July 25th, 1947—adhered to and reaffirmed on May 17th, 1948—and by its opinions, has declared that it is the law of this case that the net earnings from operation of the property of the Railway in the hands of the Trustees belong to the First and Refunding Bondholders. They cannot be diverted or used for the benefit of Atlantic Coast Line Railroad Company or any other party. Those Orders are not subject to attack by the Coast Line but are binding upon it as Intervenor herein and the Orders of the Commission that would require a transfer to or use of these earnings or any part thereof for the benefit of Cost Line are inconsistent and in conflict with them.

V.

The Orders of the Interstate Commerce Commission dated April 8, 1947 and March 25th, 1948, do not accord due and legal recognition to the rights of First and Refunding bonds under the provisions of the mortgage securing said bonds, against the property of the Bankrupt and the cash in the hands of the Trustees which is the proceeds of earnings from operation of the property of the Bankrupt during Receivership and Bankruptcy.

VI.

The Commission had no power or authority to require a transfer of properties of the Debtor (except as the result of a judicial sale ordered by this Court) to any Cor-

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poration except one organized, or to be organized, for the purpose of carrying out a Plan of Reorganization against the opposition of a majority of its bondholders. Atlantic Coast Line Railroad Company was organized years ago, was not organized for the purpose of carrying out any Plan of Reorganization of the Bankrupt and the Orders of the Commission inhibit a judicial sale.

VII.

The finding of the Commission that reorganization of the Debtor as a separate corporation in which St. Joe Paper Company would own more than 50% of the stock, would be contrary to the public interest, did not give it power to order a compulsory transfer to Coast Line or merger of properties of the Bankrupt with those of Coast Line even if it found that a transfer to Coast Line would be compatible with the public interest. The statute does not authorize the Commission to condemn or expropriate the vested interests or rights of creditors of the Bankrupt in its properties for the public benefit or for the benefit of another railroad nor to value them for condemnation purposes; nor to order the holders of liens and claims to divest themselves of ownership thereof; nor to arbitrarily divest the lien securing First and Refunding Bonds without payment of the amount due thereon. If the Commission was unable or unwilling for any reason to approve or prepare a Plan of Reorganization and Rehabilitation of the Bankrupt among its creditors (the stockholders having no interest) its duty under the statute was to report such conclusion to this Court, which alone has power and jurisdiction to determine the course of further proceedings in this cause.

VIII.

The Reports and Orders of the Commission are unfair and inequitable since they show on their face that the value of the securities holders of First and Refunding bonds

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are to receive plus the cash to be paid by Atlantic Coast Line Railroad Company does not equal $40,500,000, which the Commission finds is the minimum valuation and fixes as a "Cash upset price". To the extent that the value of the securities fails to equal the valuation fixed by the Commission, the Orders patently constitute a confiscation of the interests of the First and Refunding Bondholders.

IX.

The statute does not authorize the Interstate Commerce Commission by a Plan of Reorganization, or otherwise, to make an offer to sell or transfer all the property of the Debtor to a third party for a consideration fixed by the Commission in its sole discretion or to prescribe the manner in which the consideration should be paid, or to propose the same as a Plan which is contingent upon the acceptance of it by one not a party to the cause; nor is the Commission authorized to certify to the Court such a Plan on the assumption that the Court will coerce lien creditors to accept or consent. The Third Supplemental Report, on its face, shows that it rests upon that assumption. The provisions of the Orders of the Commission do not constitute a Plan of Reorganization, but are a counter offer or proposal to the Coast Line with two material changes. Coast Line did not consent or accept the proposal before the Report and Order of the Commission were certified to this Court. Acceptance or agreement of Coast Line on May 14th, 1948, by its stockholders cannot give validity to the unilateral proposal of the Commission that was certified to this Court for approval.

X.

The Reports and Orders of the Commission show on their face that they were not designed to reorganize the Bankrupt for the benefit of the creditors of the Florida East Coast Railway Company, but as a means by which the

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Interstate Commerce Commission might force a "transfer", or a "merger" of the properties of the Bankrupt with those of Atlantic Coast Line Railroad Company to enhance or improve its revenues, or to prevent a loss of interchange of traffic that might result in the event of a reorganization of an independent road, and to provide Coast Line with cash by which it can refund the existing First Mortgage, rehabilitate the property acquired by it and increase its working capital.

XI.

The provisions of the Orders of the Commission are inconsistent, ambiguous and impractical on their face, and cannot be complied with.

Section II of the Order of April 8th, 1947, provides that all the property of the Debtor of every kind and character, real, personal or mixed, shall vest in Atlantic Coast Line Railroad Company. This includes all supplies and materials on hand and all current assets (except cash in the hands of the Trustee) yet neither the Order nor the Report makes provision for payment of the current liabilities of the Trustees which as of December 31st, 1947, amounted to over $14,000,000.

The Report creates a "cash reserve" for a "Rehabilitation Program" totalling $10,725,551. that includes $2,600,000. for purchase of materials and supplies, and by Section VI of the Order requires the Reorganization Managers to set aside in a separate cash fund $10,725,551. (which includes $2,600,000. for materials and supplies) to be expended for completion of the Rehabilitation Program although the Record shows that at the time of the hearing the Debtor had materials and supplies in excess of $2,600,000. and the Trustee testified on May 17th, 1948, that the value of the supplies and materials then on hand exceeded $4,000,000. in value.

Section VII of the Order provides that all excess cash in "the Treasury of the Debtor" (there is none since all

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cash is in the hands of the Trustee) which is not reasonably necessary for any of the purposes provided for in the Report shall be distributed pro rata to holders of the Debtor First and Refunding bonds but does not provide for payment of current liabilities of the Trustee.

Section XV of the Order provides that the claims arising from the administration of the Trust, etc. to the extent not paid by the Debtor or Trustees shall be assumed by the Coast Line and that if Coast Line pays the same, they constitute a charge upon the property securing the new divisional mortgages prior to the lien of the new mortgages. The Fourth Supplemental Report recognizes the liens heretofore created by the Court are superior to the lien securing the First and Refunding Bonds and to any interest Coast Line could acquire under a Plan of Reorganization and its power to create further liens to secure First and Refunding Bondholders for the use of cash belonging to them, but did not amend the provisions of the Third Report so as to reconcile it therewith.

XII.

The Commission did not determine the value of the property to be transferred or sold as required by Sec. 205 (3), Chapter 8, Title XI U.S.C.A., but determined only its value for purposes of reorganization among creditors of the insolvent Debtor. That valuation was fixed at $40,500,000 by the Third Supplemental Report in a Plan of Reorganization under which all bonds and stock would be issued to First and Refunding Bondholders and cash of Trustees would be used to satisfy the First Mortgage, provide working capital for the new company and make needed improvements, all directly for the equitable benefit of the holders of the lien of the First and Refunding Bonds. Yet the Commission fixes the same valuation as the consideration to First and Refunding holders for a release of their liens would pay off the First Mortgage with Trustees' cash, to give Coast Line title free of the same, and

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would coerce First and Refunding Bondholders to accept 3½% First Mortgage Bonds would use $10,700,000 of the Trustees' cash to construct improvements for the benefit of Coast Line, to pay equipment obligations for four years after transfer and to furnish working capital to Coast Line, and did not value the property to be transferred without such expenditures of cash, which is not the property of the Debtor and cannot be sold or transferred without the consent of these Bondholders.

XIII.

The procedure before the Commission resulted in a denial of due process of law to the holders of First and Refunding Bonds of the Bankrupt. The Petition in this cause was filed by Florida East Coast Railway Company bondholders and this proceeding was prosecuted in this Court to rehabilitate the Debtor for the sole benefit of its creditors. Coast Line had no legal right to intervene in that cause either before the Commission or in this Court for the purpose of instituting a new controversy against those bondholders to deprive them of their lien and other rights and to acquire for its own benefit, the property of the Bankrupt against their wishes. The order of the Commission permitting Coast Line to intervene, made without notice and hearing, was erroneous and illegal. The record of conduct of the cause before the Commission shows that the original issue in the case was disregarded by the Commission, the field of litigation was extended beyond the scope and purpose of the statute, the pleadings in the cause and the purpose of the creditors of the Bankrupt who instituted and participated therein prior to intervention was ignored, resulting in a trial of issues that were not before this Court. The Commission perverted the case from the purpose for which this Court referred it, to a purpose of its own design. The Reports of the majority of the Commission and the Orders made pursuant thereto are inequitable, unfair and violate the standards and requirements

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of due process of law applicable to the trial of causes in this Court and would result in a miscarriage of justice.

XIV.

The Trustees (and Receivers) of the Bankrupt with the consent of bondholders, have paid out of earnings, upon which First and Refunding Bonds had a first lien, interest on the First Mortgage of the Bankrupt in an amount exceeding $8,000,000. to prevent default and foreclosure of the same and, in addition thereto, have expended out of earnings for extraordinary additions and betterments an additional sum, the exact amount of which is not known, but which the Trustees in Bankruptcy are hereby required to disclose. The records in this case indicate that the total amount expended for last named purposes during Receivership and Bankruptcy prior to July 1, 1947, exceeds $20,000,000. Officials of St. Joe Paper Company not only consented to but, in many instances, suggested construction of those additions and betterments and the purchase of new equipment, in reliance upon the decision of the Commission of April 8, 1942, and upon the Order of this Court dated October 19, 1943, to increase the earning power of the property and the value of the same, and to increase the ability of the Railway to render adequate and efficient service to the public. Many or most of the improvements so constructed could not have been paid for out of earnings without the consent and cooperation of the bondholders. The Commission gave no consideration to the position of the bondholders due to this use of nearly $30,000,000 of profits on which they held a superior lien when it fixed a valuation for the purpose of transfer or sale to Coast Line, and required expenditure of over $10,700,000. additional for improvements. The total of these sums exceeds the gross valuation of the Commission. Regardless of whether the Commission had, or had not, power to order a transfer or sale to another corporation under other circumstances, its attempt to do so here would work a gross injustice upon

the bondholders causing a loss to them of over Forty Million Dollars of their security which they allowed to be used for rehabilitation of the properties of the Bankrupt for a period of fourteen years before Coast Line even indicated a desire to acquire the properties of the Bankrupt. Coast Line is estopped by the equity of the facts from now seeking to dispossess the bondholders of their lien long after the improvements have been made; orders that would compel a transfer to it at this time without reimbursing the bondholders for such use of earnings that were not necessary in the ordinary operation of the Road are contrary to the principles of equity and justice.

XV

The findings of the Interstate Commerce Commission that a reorganization of Florida East Coast Railway Company in which St. Joe Paper Company would own a majority of the stock would be contrary to the public interest is not supported by any evidence and is an erroneous inference of a majority of the Commission based upon its misconception of applicable law. The minority report asserts that the great preponderance of pertinent testimony is to the contrary and that to reach the conclusions of the majority report the testimony of persons served by the Railway, of its employees and of its security owners had to be disregarded. The so-called finding of the Commission is not a finding of fact but an erroneous inference of a majority of its members. The only inference that can be correctly drawn from the evidentiary facts and which the record compels is to the contrary.

The fact that St. Joe Paper Company might have an opportunity and might be tempted to abuse its power or to evade the responsibilities of a carrier is a mere assumption and no evidence was offered to show that it would or ever had done so. The statement in the Report that the Commission could not adequately protect the shipping pub-

lic and connecting carriers is unjustified, unsupported by facts and unfounded.

XVI.

The manner and means by which Atlantic Coast Line Railroad Company obtained leave to intervene in the proceedings before the Commission and to file what it called a Plan of Reorganization of the Bankrupt was so unfair and inequitable as to prevent the affirmance of the Reports and Orders of the Commission which merely embody the proposal made to it by the Coast Line with some modifications. In November 1944, Coast Line petitioned the Commission for leave to intervene in this proceeding to support a proposal made by Lynch *et al.*, and, without notice to the First and Refunding Bondholders and without according them a hearing upon said petition, the Commission entered an order granting the petition, conditional on the case being reopened. When the case was reopened, Coast Line disregarded the proposal made by Lynch *et al.*, and did not attempt to support it. Instead it acquired assignment to it of two unsecured, non-negotiable claims—one from Kenan and Haines as Trustees of the estate of Mrs. Flagler Bingham and one from Florida East Coast Car Ferry Company, all of the stock of which belonged to that estate. The Trust, also, owned all the stock of the Bankrupt and Kenan was President of the Bankrupt and of the Car Ferry Company. Both of the assignments (Exhibits 146 and 147) were executed by Kenan. The claims assigned were for money advanced voluntarily by the assignors under their Trust to the Bankrupt in 1930 and 1931 to aid it in paying the then due interest on its First and Refunding bonds in order to protect the stock of the Bankrupt which was owned by the Trust.

Before these claims were assigned to it, Coast Line had no interest in this cause or in the property of the Bankrupt. They were acquired for the preconceived purpose of being

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able to superficially comply with the provisions of the statute which limit the right to submit Plans of Reorganization to parties in interest and for the purpose of obtaining the property of the Bankrupt at a price advantageous to it.

Assignors had for a period of fourteen years admitted that the claims were worthless and not entitled to participate in a reorganization of the Debtor and had declined to propose a Plan of Reorganization, Interstate Commerce Commission had in its Reports and Orders of April 8, 1942 and January 8, 1945, expressly held that the claims were worthless and that no objection had been made thereto by the owners.

Notwithstanding these facts, Kenan without the knowledge of the First and Refunding Bondholders of the Bankrupt and without the knowledge and consent of this Court of Bankruptcy, assigned these claims to Coast Line on October 18, 1945. The consideration for the assignments was $5,000. cash and an agreement by Coast Line to prosecute the claims against the Bankrupt paying all expenses incurred thereby including lawyers fees and to pay over to the assignors one half of the cash or securities received therefrom. Coast Line estimated its recovery on the two claims at $93,000. In addition to assignment of the claims, Kenan verbally agreed that Coast Line could purchase the stock of the Bankrupt at a price to be agreed upon at the time of acquisition. At the time Coast Line acquired said claims, Kenan and Haines were advised by it of its purpose to utilize said claims to enable Coast Line to superficially become a party in interest in this cause and submit a plan by which it might acquire all the property of the Bankrupt at a price acceptable to it against the anticipated opposition of the Bankrupt's lien creditors. The agreement and the assignments are illegal, void and contrary to public policy. They constitute a concealed attempt by officials of the Bankrupt, owners of all its stock, to collect from the Estate of the Bankrupt, a substantial sum on claims which they

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had admitted, and the Commission had held, to be worthless, and to aid a stranger to the record in its effort to deprive the real parties in interest of their vested rights in property of the Bankrupt and of cash earnings therefrom. Neither the Commission nor this Court would have permitted the Trustees of the Bingham Estate nor their alter ego, the Car Ferry Company, to acquire an interest in the property of the Bankrupt under a Plan of Reorganization without providing for payment in full of the debts of the Bankrupt. Coast Line could acquire no greater rights.

The proposal of the Coast Line submitted to the Commission was pursuant to a preconceived plan prepared with the collaboration, assistance and approval of representatives of the Committee of First and Refunding Bondholders including its Chairman, Arthur M. Anderson and his associates in J. P. Morgan & Company, Bankers for Coast Line, and the President and Assistant Secretary of Safe Deposit and Trust Company of Baltimore which corporation controls the Atlantic Coast Line Railroad Company through ownership of Coast Line stock and its control of the Atlantic Coast Line Company of Connecticut, the largest stockholder of the Coast Line, without the knowledge of the holders of First and Refunding bonds of the Bankrupt and without the knowledge of the Commission and this Court.

Neither Kenan and Haines, the Coast Line nor Safe Deposit and Trust Company, nor the Committee of First and Refunding Bondholders disclosed to the Commission the above facts or circumstances notwithstanding their duty to make full disclosure of their conduct.

The Reports and Orders of the Commission are the direct and proximate result of this concerted and preconceived scheme of the parties named to acquire the property of the Bankrupt for the Atlantic Coast Line Railroad Company at a price and on terms satisfactory to it in violation of the policy of Bankruptcy Courts; to use the process of this Court designed to benefit and protect the real parties

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in interest in order to accomplish a contrary result. Coast Line and Safe Deposit & Trust Company, which controls it, are barred from claiming any benefit that might accrue from the Orders of the Commission and from obtaining any interest in the property of the Bankrupt by reason thereof.

XVII.

The Reports of the majority of the Commission and its Orders of April 8, 1947 and March 25, 1948, are unfair and inequitable because they prohibit First and Refunding Bondholders of Florida East Coast Railway Company from exercising their contractual and legal right to bid for the property of the Bankrupt and prevent this Court from receiving and considering bids from other parties in competition therewith. Since it was found by the Commission and is admitted by all parties that the value of the property of the Bankrupt plus the net cash accumulated in the hands of the Trustees from earnings is less than the amount due upon said bonds, said Reports and Orders are contrary to the rules of equity and law which impose upon the Commission and upon the Court the duty of securing for lien holders the highest and best price that can be obtained if such property is to be sold or forcibly transferred. Neither the Reports nor the Orders find that the valuation represents the highest and best price that can be obtained.

The provisions of the Reports and Orders would, on the contrary, enable Coast Line to acquire the property of the Bankrupt at a price and on terms to which the holders of the bonds of the Bankrupt do not agree and the Reports assume that the valuation placed upon the property of the Bankrupt by the Commission in its Report in 1945 for the purpose of reorganization only, is the maximum price that a transferee or purchaser should pay and the maximum the Bondholders should receive. The Commission did not consider the benefit and profit that would inure to Coast Line and railroads owned or controlled by it through the

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control Coast Line would obtain over freight and passenger traffic originating and terminating upon the lines of the Bankrupt, in addition to the profit accruing from its operation of the Bankrupt's property.

Yet, the stockholders of Atlantic Coast Line Railroad Company in accepting the offer of the Commission and in authorizing its officers to make payment of such cash as may be necessary did so upon representations of the officers and Directors that acquisition of the property and cash would enable Atlantic Coast Line Railroad Company to control the interchange of freight and passenger traffic at Jacksonville. The meeting of stockholders was attended by only a few that were not officers or Directors, proxies having been procured by representations of the great benefits and advantages to accrue from acquisition.

Valuation of the property of the Bankrupt for purpose of sale or transfer, free from lien, should include the elements of value to the Coast Line that influenced the Coast Line to accept and those elements that influence the Bondholders to oppose these Orders. The maximum price Coast Line would pay for such properties cannot be determined by the Commission. That can be determined only by a sale with the consent of the holders of said bonds, or a forced public sale where competitive bidding is permitted. The consideration offered by the Coast Line in its original proposal was not the maximum that it would pay. It admitted this by voluntarily amending its first proposal during the hearings; by accepting the Commission's report and Order of April 8, 1947, that required payment of $1,125,000. more in cash and that preferred stock should be given full voting power; and by the resolution of its stockholders adopted May 14, 1948, authorizing its officials to pay additional sums of cash, the amount of which was at that time unknown, to satisfy liens imposed upon the property of the Debtor by this Court on July 17th and 25th, 1947, and May 17th 1948, and such additional liens that may be imposed by the Court in the future.

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Objections of St. Joe Paper Company.

XVIII.

In April 1942, the Interstate Commerce Commission disapproved a Plan of Reorganization offered by the Trustees of the duPont Estate which would have provided for a purchase by them of a majority of the stock of the reorganized company for $4,000,000. in cash, sustaining at the same time the claim of the Committee of First and Refunding Bondholders and other Bondholders, that First and Refunding Bondholders of the Bankrupt were legally entitled to own all new stock issued in reorganization. After this decision, the President of St. Joe Paper Company advised Mr. Delano, then Chairman of the Board of Directors of Coast Line and Chairman of the Board of Directors of Safe Deposit & Trust Company, which controlled Coast Line, that he desired to purchase a majority of the bonds of the Bankrupt and requested him to assist in the purchase of bonds held by the Committee of First and Refunding Bondholders which at that time amounted to approximately 50% of the total; that it was his desire to preserve the friendly relations which had long existed between the Coast Line and Florida East Coast Railway Company. Atlantic Coast Line Railroad Company was not endeavoring to purchase said bonds for reasons unknown to this bondholder, but on information and belief, because of its then financial position. Mr. Delano referred the matter to Mr. Cutler, President of Safe Deposit & Trust Company, a member of the Committee and a Director of the Coast Line, through whom meetings with the Committee were arranged and a contract of purchase and sale was entered into. Pursuant thereto and upon the request of members of the Committee who were officers of the various corporation bond owners, St. Joe Paper Company purchased all bonds owned by those corporations (except the bonds owned by Safe Deposit & Trust Company, which by agreement with it, were withdrawn from deposit), and all bonds deposited with the Committee which were tendered to the purchaser under its

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contract with the Committee. The price paid for the bonds was in excess of the then current market quotations. Coast Line's opportunity to benefit from interchange of traffic would have been protected. After this purchase, St. Joe Paper Company objected to approval by this Court of the Commission's Plan and Order of April 8, 1942, and on October 19, 1943, the Court sustained its objections and referred the case to the Commission for further consideration with an opinion directing that the cash earnings accruing in the hands of the Trustees from operation of the Railway should be applied in satisfaction of claims of the Bondholders of the Bankrupt or allocated as a component part of a Plan of Reorganization providing for the use of them for the best advantage of such Bondholders.

Safe Deposit and Trust Company cooperated fully with St. Joe Paper Company in all matters involving the Bankrupt, intervened before the Commission, and its President, by his testimony, supported the Plan of Reorganization proposed by St. Joe Paper Company. In the summer of 1945 Mr. Delano died and was succeeded as Chairman of the Board of Directors of Atlantic Coast Line Railroad Company by Mr. Adams, who succeeded, also, to the Chairmanship of the Board of Directors of Safe Deposit & Trust Company. In November 1944, without the knowledge of St. Joe Paper Company, Coast Line determined to prevent St. Joe Paper Company from owning control of the Debtor and to accomplish this purpose entered into an agreement with S. A. Lynch *et al.* by which Bondholders of the Bankrupt would be compelled to sell to Coast Line 60% of the new stock issued to them under a Plan of Reorganization. This agreement was submitted to the Commission by S. A. Lynch *et al.* as a Plan of Reorganization. It was disapproved by the Commission January 8, 1945. On October 23, 1945, Coast Line submitted its own proposal which would compel a transfer or sale of all property of the Debtor to it on stated terms. Notwithstanding the previous arrangements and understandings between St. Joe Paper

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Company and officers of Coast Line and Safe Deposit and Trust Company, which controls the same, the officers of those corporations joined or collaborated in the preparation of that proposal without advising this bondholder of an intention so to do and Coast Line was permitted by the Commission to prosecute a case against all bondholders of the Bankrupt for the purpose of preventing a reorganization of the Bankrupt and to obtain for itself ownership of the properties and a major portion of cash accumulated by the Trustee from earnings by calling its proposal a "Plan of Reorganization". This conduct of Coast Line and Safe Deposit & Trust Company was inequitable and unfair to this bondholder, and Coast Line and Safe Deposit & Trust Company are equitably estopped from now taking a position inconsistent with their previous conduct and agreements with St. Joe Paper Company, or from attacking St. Joe's ownership or from benefiting by the action of the Commission. Safe Deposit & Trust Company is, also, estopped by the record from opposing a rehabilitation of the Bankrupt and from obtaining indirectly an interest in the property of the Debtor at the expense of and against the will of this bondholder.

XIX.

The finding of the Commission in the Third Report that it would be incompatible with the public interest for St. Joe to control a reorganized Debtor, rests solely upon its conclusion that St. Joe Paper Company might, by reason of its large banking interests, influence shippers or receivers to route their shipment over a connecting carrier which might have grave consequences, and against which the Commission would not be able to protect the shipping public and connecting carriers. This conclusion is due to its erroneous conception of the meaning of "public interest" which it confused with "public benefit". A power to determine "public benefit" would be an arbitrary power that cannot be constitutionally delegated. Public interest

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in carriers is a concept "not without ascertainable criteria", and the evidence that the Bankrupt—even under Court supervision—has furnished adequate transportation, has been operated more efficiently and economically than Coast Line has been under private control; that the physical facilities of the carrier have received the appropriate and best possible use; that the Bankrupt can be reorganized with adequate capital and with funds available for complete rehabilitation so as to insure continuous operation in the future (without any debt) and that if reorganized and rehabilitated its employees will be fully protected against loss of jobs, removal from their homes, loss of seniority and any reduction in their pension rights, is without contradiction. The Commission affirmatively found that such a reorganization would not violate either the spirit or the letter of the commodity clause of the Commerce Act. A transfer or sale to Coast Line will violate several of the criteria.

The conclusions of the Commission that what it terms "unification of the Debtor's properties with Coast Line" would result in betterment of service and that savings will result are inconsistent with its detailed findings on the various claims thereto. Its Reports do not find that without a compulsory sale or transfer, service will be inadequate or that equal economies would not result, if the Road be restored to private management.

XX.

The Third Supplemental Report of the Commission fixed a valuation of the property of the Bankrupt and cash of the Trustees to be transferred to the Coast Line at the same amount that the Second Supplemental Report fixed as a valuation for purposes of rehabilitating and reorganizing the Debtor. The Third Supplemental Report did not differentiate between the value of the property and cash to the Debtor's Bondholders under its former report where

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all the securities would be owned by them and the cash earnings in the hands of the Trustees would be disbursed to them for their sole benefit, and the valuation of the property plus cash in the hands of the Trustees for transfer or sale to Coast Line free from the lien of the mortgage. The Third and Fourth Supplemental Reports would divest the lien of the mortgage upon the properties and cash, and require $12,000,000, of the Trustee's cash to be used to pay the First Mortgage on the Debtor's property prior to the transfer of the property and at the same time require holders of First and Refunding Bonds of the Bankrupt to accept new First Mortgage bonds of the transferee bearing 3½% interest; it would require the transfer to Reorganization Managers of $10,725,551 of cash of the Trustees to be used to pay installments maturing upon existing equipment trusts for a period of four years, to construct improvements, additions and betterments to the property transferred, before or after transfer, and to furnish Coast Line with additional working capital without increasing the consideration to be received for such transfer or sale and without provision for reimbursement in whole or in any part of the holders of First and Refunding Bonds for depriving them of their cash security and of their right to benefit from the same. Under the law the cash in the hands of the Trustee belongs to the First and Refunding Bondholders of the Debtor, and cannot be diverted to or for the benefit of others and cannot be sold as property of the Bankrupt.

These provisions of the Third and Fourth Supplemental Reports show that the primary purpose of the Commission was to enable Coast Line to acquire the property and cash of the Bankrupt on terms the Commission assumed would be acceptable to Coast Line. The Fourth Supplemental Report shows from its reliance upon unsworn and unverified statements that its decision was to limit the consideration present holders might receive to a gross valuation acceptable to Coast Line and on terms it could and

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would accept, but which it had the option to reject, was, also, based on the assumption that this Court would coerce creditors of the Bankrupt to accept the consideration provided by the Commission.

St. Joe Paper Company is prepared to offer evidence to prove all allegations of fact contained in the above Objections where such facts are not already proved by the record and evidence taken at the hearing before this Court and the Commission.

/s/ GILES J. PATTERSON,
Counsel for St. Joe Paper Company.

Objections of the Lynch Interests to the Modified Plan of Reorganization Embodied in the Third and Fourth Supplemental Reports of the Commission, and Claims for Equitable Treatment.

IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF FLORIDA

In Proceedings for the Reorganization of a Railroad.

IN THE MATTER *of* FLORIDA EAST COAST RAILWAY COMPANY, Debtor.	No. 4827-J.

S. A. Lynch, S. A. Lynch Corporation and other associated intervenors, herein called "the Lynch interests",

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pursuant to order of this Court entered herein April 29, 1948, hereby file their detailed and specific objections to the plan of reorganization for the debtor which has been certified to this Court by the Interstate Commerce Commission pursuant to its report and order dated April 8, 1947 (Doc. 578) and affirmed by its report and order dated March 25, 1948 (Doc. 636), together with their claims for equitable treatment.

OBJECTIONS TO COMMISSION'S PROPOSED PLAN.

I. COMMISSION'S FINDINGS AND THE RECORD.

1. *Weight To Be Accorded The Commission's Finding Of Value.*

(a) The Commission's finding of value, although purporting to be for reorganization purposes, is in essence a finding of value for a forced sale that would involve the divestiture of the rights of the Refunding bondholders to their security or its equivalent, and is not entitled to the presumptions and weight ordinarily accorded a finding of value by the Commission for reorganization purposes.

(b) This is the first instance in a contested case where the Commission has attempted to fix the value in a Section 77 proceeding for a sale of the estate to a stranger to the proceedings. This Court should examine de novo the issues raised with respect to value for the purpose of ascertaining the validity of the Commission's conclusions.

2. *Disregard Of And Departure From The Facts Of Record.*

(a) The Commission's proposed plan is not based upon sufficient findings and is based upon certain assumptions and conclusions unsupported by facts of record.

(b) The Commission's findings and conclusions as to value, price and cash reserves are based upon a mis-

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apprehension of, and failure to give proper consideration to, the facts of record. The Fourth Supplemental Report finds that "None of the important facts recited in our third supplemental report was challenged either by petition or on argument." On the contrary, the petition of the Lynch interests, dated July 19, 1947, for modification of the Commission's Third Supplemental Report and Order, and their oral argument, challenged many of the facts recited, or referred to other facts not recited, in the Third Supplemental Report.

II. Finding of Value.

3. *Changed Economic Conditions.*

The Commission fixed a valuation for the purposes of sale of the debtor's properties to Atlantic Coast Line of $40,500,000 and refused to increase the valuation made in 1942 for reorganization purposes upon the basis of previously existing conditions. In so doing, the Commission failed to take into account changes in economic conditions in the territory served by the debtor, as for example, the agricultural development, the growth in population and the development in construction and business generally.

4. *Improvements In The Debtor's Properties.*

(a) In its findings of value the Commission failed to take into account the evidence showing increased earnings resulting from improvements already effected by the Trustees pursuant to the so-called Improvement Program and from other additions and betterments already effected. Among these improvements are the rail program providing for the substitution of 112 pound rail, the acquisition of modern locomotives and additional new freight cars, the program of modernization of passenger service with the consequent elimination of substantial deficits from such service, the construction of Fort Pierce

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cut-off, abandonment of part of the Okeechobee branch and numerous others. Although the evidence showed that a portion of the Improvement Program would provide specifically ascertained savings of $731,000, the Commission has increased its original 1942 estimate of prospective earnings only $232,000.

(b) In addition to the specifically ascertained savings, other savings will be realized from other phases of the Improvement Program which at the time of the hearing before the Commission had not been specifically ascertained. Presumably these expenditures are justifiable from the viewpoint of future operations, since otherwise they would not have been recommended by the Trustees and approved by this Court. However, the Commission made no increase in its estimate of future earnings to allow for the increased earnings that will necessarily result from these additional improvements that have been and will be made pursuant to the Improvement Program.

5. *The Relative Earning Power Of The Debtor.*

In arriving at its findings of value the Commission failed to take into account the excellent earning showings of the debtor as contrasted with other carriers of comparable size and location. This showing was to the effect that the comparative results of the debtor for the years 1945 and 1946 were not only well above the average for all Class I railroads in the nation and for all Southern Region carriers, but were also outstanding in a group of approximately fifteen other Class I carriers with comparable operating revenues.

6. *The Temporary Character of 1947 Revenues.*

In arriving at its findings of value the Commission failed to take into account the temporary character of the depressed revenues in 1947. Although attributable to

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abnormal circumstances prevailing in that period, occasioned by storms and flood conditions, the Commission gave weight to 1947 revenues without taking into account their temporary character.

7. *Improved Earning Power Since 1941.*

In arriving at its findings of value the Commission failed to take into account the overall improved earning power of the debtor since 1941. The Commission's original report, issued in 1942, was based upon conditions existing prior to the close of the hearings in 1941. However, it has increased its estimate of prospective earnings by only $232,000 since that time, thus failing to take into account the evidence showing the remarkably increased earning power of the debtor, as contrasted with earlier years.

8. *Improved Cash Position.*

In arriving at its finding of value the Commission failed to take into account the improved cash position of the debtor since 1941, which permits of the carrying out of the Improvement Program without the issuance of bonds for that purpose, as originally contemplated in the Commission's first report.

III. Sale Price.

9. *Effect of Commission's Valuation.*

The price fixed in the Commission's proposed plan for sale of the debtor's properties to Atlantic Coast Line is based upon the Commission's valuation of the debtor's properties arrived at in the manner aforesaid. Consequently, the price is based upon an improper, illegal and confiscatory value, for the reasons previously set forth.

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Objections of the Lynch Interests.

10. *Unification Savings.*

The price fixed in the Commission's proposed plan fails to take into account and give proper credit to the debtor's properties for their share of savings resulting from unification. Although the Commission found that these savings would amount to between $350,000 and $1,000,000 per annum and the evidence showed that these savings should be credited in equal amounts to the two properties, the Commission refused to take them into account solely because they would only be gradually attained and they would not result immediately upon completion of unification.

11. *Compensation For Loss Of Opportunity To Participate In High Earnings.*

The price fixed in the Commission's proposed plan fails to provide compensation for the deprival of the Refunding bondholders' opportunity to recoup their losses out of earnings in periods of high earnings. No serious question exists that under reorganization as an independent property the Refunding bondholders would receive all of the equity in the properties of the debtor. Under such circumstances the Refunding bondholders would be able to recoup past losses from, and offset future periods of lower earnings against, the earnings from more prosperous years. Under the Commission's proposed plan for sale of the debtor's properties to Atlantic Coast Line this opportunity is lost. The Commission failed to provide adequate compensation for this deprivation of the Refunding bondholders' rights.

12. *Compensation For Cash Contributions.*

(a) The price fixed in the Commission's proposed plan does not provide compensation for the Refunding bondholders' enforced contributions for the rehabilitation and improvement of the properties of the debtor, although under the Commission's proposed plan these properties would be acquired by Atlantic Coast Line and the bene-

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fits thereof would accrue to the latter. The Improvement Program requires the expenditure of millions of dollars of cash derived from earnings of the properties subject to the lien of the Refunding mortgage and which would otherwise be distributable to the Refunding bondholders. A major portion of this cash has already been expended pursuant to the Improvement Program and the proposed plan requires the reservation of additional cash to meet the balance of the program. However, the Commission's proposed plan fails to provide adequate compensation therefor in the price fixed for the proposed sale of the debtor's properties, and as pointed out above, the results to be attributed to these expenditures have not, except to a minor extent, been taken into account by the Commission in fixing the valuation of the properties.

(b) These improvements are being acquired by an enforced contribution of actual cash on the part of the Refunding bondholders. Adequate compensation for this enforced contribution of cash cannot be made by an allocation of securities in a stranger corporation, particularly where this allocation represents only a judgment estimate having no direct relation to the cash actually spent. The Commission's proposed plan fails to provide for the repayment by Atlantic Coast Line of this cash contribution, even though under the proposed plan Atlantic Coast Line will enjoy the benefits thereof.

13. *Loss Of Return On Securities.*

The price fixed in the Commission's proposed plan would require the Refunding bondholders to accept new securities in a stranger corporation carrying prospects of a lower return than the return on the securities available under an independent reorganization and operation.

The Commission recognizes that in periods of moderate prosperity, and even more so in periods of higher earnings, the rate of return to the Refunding bondholders

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would be more favorable under independent operation, but it failed to provide adequate compensation for this reduction in the expectable return on investment. Its purported adjustments in the plan proposed by Atlantic Coast Line are demonstrably insufficient to offset this loss in normal return.

14. *Commission's Price Is Less Than Atlantic Coast Line Offer.*

The price fixed in the Commission's proposed report provides less adequate treatment for the Refunding bondholders than the price voluntarily agreed upon by Atlantic Coast Line in 1944, as set forth in the Commission's Second Supplemental Report, despite the improved conditions affecting the debtor's operations that have been brought about since that time.

15. *Offer Of The Ball Interests.*

The Commission failed to take into account and consideration the offer of the Ball interests, at the argument before the Commission on January 8, 1948, to accept a plan providing for the payment of $1,000 in cash per Refunding bond.

IV. Cash Reserves.

16. *Cash Reserves For Improvements.*

(a) The plan proposed by the Commission contemplates creation of a cash reserve for completion of the Improvement Program despite the fact that it also contemplates sale of the properties to Atlantic Coast Line. The cash reserve for the Improvement Program was originally conceived for the purpose of assuring the availability of cash to complete the Improvement Program and was predicated on the assumption that the equity in the reorganized debtor would vest in the Refunding bond-

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holders, who contribute the cash. As contrasted with this, the Commission's proposed plan contemplates that the Refunding bondholders will finance the completion of the Improvement Program and that Atlantic Coast Line and not the Refunding bondholders will reap the benefits of such improvements. Moreover, this is done despite the fact that the furnishing of funds by the Refunding bondholders would not be essential inasmuch as Atlantic Coast Line would have sufficient cash for that purpose.

(b) The effect of the Commission's proposed plan is to require the Refunding bondholders to rebuild and rehabilitate the properties of the debtor out of the funds on which they have a lien, under the guise of improving the security for their bonds, although they are later divested of the opportunity of recouping this enforced investment or of reaping its benefits.

(c) The effect of the Commission's proposed plan is to require the carrying out of a program involving the replacement of stations and terminals that have adequately handled traffic larger than will arise in the foreseeable future, the financing to be provided by earnings from the operation of properties upon which the Refunding bondholders have a lien, despite the fact that the properties and the improvements will be transferred to a stranger.

(d) The effect of the Commission's proposed plan is, further, to require that any increased costs incurred in carrying out the Improvement Program prior to reorganization be borne by enforced cash contributions of the Refunding bondholders, although the benefits will accrue to Atlantic Coast Line.

(e) The Commission's proposed plan fails to provide adequate compensation for these enforced cash contributions.

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Objections of the Lynch Interests.

17. *Cash Reserve For Operating Expenses.*

The Commission's proposed plan requires a cash reserve for certain operating expenses, although this provision is wholly unsupported by the evidence, or otherwise. Moreover, under the Commission's regulations, a charge to operating expense would be made at the time of the expenditure, even though already included in the cash reserve. This would result in making available an additional amount of cash equal to the reserve and would result in duplication, under which Atlantic Coast Line would receive the money twice, once in the cash reserve, and once in a cash deduction from the earnings of the properties.

18. *Cash Reserve For Deferred Maintenance.*

The Commission's proposed plan also requires a cash reserve for deferred maintenance despite the evidence showing the lack of necessity for such a reserve and despite the fact that, as in the case of charges to operating expenses, this would result in a duplication under which Atlantic Coast Line would receive the cash twice.

19. *Materials and Supplies.*

The Commission's proposed plan requires an allowance for materials and supplies of $2,600,000, an amount unsupported by material evidence of record. The evidence showed that the allowance for this purpose, which under a sale to Atlantic Coast Line would benefit only that party, should not exceed $2,000,000.

20. *Working Capital.*

The Commission's plan requires setting up an amount for working capital of $500,000 cash. Should the property of Debtor be merged with or sold to the Atlantic Coast Line Railroad, the reserve for working capital is un-

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necessary and the bondholders should not be required to supply it.

21. *Inconsistency Of Order And Report.*

The portion of the plan proposed by the Commission set forth in Paragraph VII of its order of April 8, 1947, is inconsistent with the Commission's findings in its report of the same date as to the inclusion of a provision for a mandatory cash distribution.

V. Other Departures From Applicable Legal Standards.

22. *Price Paid For Refunding Bonds By Bondholders.*

The Commission's finding that its proposed plan provides fair and equitable treatment for the Refunding bondholders is based in part upon its assumption and conclusions concerning the price paid by certain Refunding bondholders for their bonds. The Commission here failed to apply applicable legal standards in the following respects:

(a) It failed to recognize that the purchase price of bonds is immaterial in determining the fair value of the property or the fairness of the treatment of the Refunding bondholders

(b) It assumes the treatment is fair and equitable if it provides a "quick market value" equal to the "net cost" of the bonds held by certain of the bondholders.

(c) It bases its findings upon certain assumed market values asserted in argument and not of record.

(d) It bases its findings upon certain assumed "net costs" asserted in argument and not of record.

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Objections of the Lynch Interests.

(e) It violated the fundamental principles of pleading, issue and proof by assuming "as substantially correct" and by "accepting unrefuted statements" made in argument and not established by the record, and thereby arrived at a finding of adequacy of price and value on a basis repugnant to law.

3. *Value Of The Coupons.*

The Commission failed to apply applicable legal standrds in basing its findings as to fair and equitable treatnent upon the assumption that holders of Refunding bonds ourchased since default regarded the coupons as being vithout value, without any support for such assumptions n the record.

24. *Disregard Of Values And Claims.*

The Commission failed to apply applicable legal standards, in its finding of fair and equitable treatment, in relying upon the theory that creditors are entitled to receive only the equivalent of the face amount of reorganization securities fixed by it, even though the actual or market value of such equivalent is very much less than the face amount of the claims or even less than its own finding of value.

25. *The Public Interest.*

In its preoccupation with the question of the public interest in who shall control and operate the reorganized debtor, the Commission has improperly subordinated and failed to apply the principles of full priority and of fair and equitable treatment of the Refunding bondholders.

26. *The Commission's Power.*

The Commission exceeded the scope of its power and authority in making its orders of April 8, 1947 and March 25, 1948.

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VI. Effects of Plan on Refunding Bondholders.

27. *Consequences Of The Commission's Proposed Plan.*

As a consequence of the foregoing, the Commission's proposed plan, including the finding of value, the price fixed for the proposed sale of the debtor's properties to Atlantic Coast Line and the provision for cash reserves:

(a) departs from applicable legal standards;

(b) is not supported by material evidence;

(c) is tantamount to the exercise of the power of eminent domain in favor of a stranger, without adequate compensation;

(d) would deprive the Refunding bondholders of their property without due process of law;

(e) violates the requirements of the rule of full priority;

(f) is not fair and equitable in its proposed treatment of the claims of the Refunding bondholders and fails to afford due recognition to their rights.

Claims for Equitable Treatment.

As and for their claim for equitable treatment, the Lynch interests respectfully request:

I. That a hearing be held before this Court on the objections hereinbefore set forth, at which hearing the Lynch interests may have the opportunity of offering evidence and of being heard on brief and oral argument in support of their objections and that at the conclusion thereof, this Court enter an order finding and concluding that the objections hereinbefore set forth are valid objections, that the Commission has not, in certain respects, followed appli-

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able legal standards, that the Commission has made findings unsupported by material evidence, that the plan does not provide fair and equitable treatment for or afford due recognition to the rights of the holders of Refunding bonds of the debtor, that it does not accord with the principles of full priority enunciated by the Supreme Court, that it would deprive the Refunding bondholders of their property without due process of law and that it should not be approved.

II. That the Court enter an order that changed conditions and new facts have arisen since the approval of the plan of reorganization by the Commission on April 6, 1942, January 8, 1945, April 8, 1947 and March 25, 1948, which are not provided for in the modified plan before the Court and which make it necessary that the Commission reconsider and revise such plan in order to assure that the plan put into effect shall then be fair and equitable, and that the court shall refer the case back to the Commission to reconsider and revise its plan in these respects.

III. That such order refer the plan and the proceedings back to the Commission with directions to reopen the proceedings and receive evidence thereon with respect to the objections hereinbefore made and to reconsider and modify the proposed plan to the extent necessary to meet said objections, including specifically:

1. A finding that for purposes of sale to Atlantic Coast Line the properties of the debtor (exclusive of the cash to be distributed) have a value of not less than $48,000,000 plus the cash equivalent of the cash expended and to be expended by the Trustees pursuant to the Extraordinary Improvement Program and pursuant to orders of this Court entered July 17, 1947, July 25, 1947 and May 18, 1948 and all other similar orders, together with adequate compensation to the Refunding Bondholders for the surrender

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of their rights to recoup their losses in years of high earnings and a proper recognition of the value of unification savings.

2. Provision for the payment, by Atlantic Coast Line, if the properties are to be sold to it, of a purchase price having a value not less than the value of the properties of the debtor (exclusive of the cash to be distributed) as aforesaid, including payment in cash of not less than the amount of cash expended and to be expended in the manner referred to in the foregoing paragraph.

3. The elimination of the entire cash reserve for the Extraordinary Improvement Program in the event that the properties are to be sold to Atlantic Coast Line, and in any event the elimination of a cash reserve for charges to operating expense and for deferred maintenance and working capital and the fixing of a maximum allowance for materials and supplies of not in excess of $2,000,000.

Dated as of July 1, 1948.

S. A. Lynch, S. A. Lynch Corporation and Associated Intervenors

Robert R. Milam,
Fred N. Oliver,
Willard P. Scott,
Attorneys for said Intervenors

Milam, McIlvaine, Carroll & Wattles,
Greenleaf Building,
Jacksonville, Florida.

Oliver & Donnally,
110 East 42nd Street,
New York, N. Y.,
Of Counsel.

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Objections of W. G. Welbon *et al.*, to so-called Plan of Reorganization.

IN THE

DISTRICT COURT OF THE UNITED STATES,

FOR THE SOUTHERN DISTRICT OF FLORIDA,
JACKSONVILLE DIVISION.

In Proceedings for the Reorganization of a Railroad.

IN THE MATTER
of
FLORIDA EAST COAST RAILWAY COMPANY,
Debtor.

No. 4827-J.

Pursuant to the order entered herein April 29, 1948 providing for the filing of objections to the so-called plan of reorganization approved in the Third Supplemental Report and Third Supplemental Order of the Interstate Commerce Commission by a five to four vote of the nine participating Commissioners, and affirmed by a six to five vote of the eleven Commissioners in the Commission's Fourth Supplemental Report and its Supplemental Order dated March 25, 1948, the following objections to the so-called plan of reorganization are submitted by and on behalf of W. G. Welbon, Gail E. Chandler, John W. Snyder, C. A. Statler, E. N. Claughton and A. W. Corbett, minority holders of debtor's First and Refunding Bonds, the holders of which, as a class, are sometimes hereinafter called "bondholders":

1. These minority bondholders adopt and submit, as their first objection to the so-called plan of reorganization,

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the following sound dissent of Commissioner Mahaffie from the five-commissioner majority Third Supplemental Report, in which dissent Commissioners Miller and Splawn joined, and Commissioner (now Chairman) Lee joined to the extent that it related "to the plan of the Atlantic Coast Line":

> "I dissent. In order to give control of this property to the Atlantic Coast Line Railroad Company it is proposed to offer that company an option to acquire it by settling the claims of the first and refunding bondholders for $4,125,000 cash, plus $36,375,000 par amount of Atlantic Coast Line securities, a total of $40,500,000. The value of these securities is substantially less than this par amount. The claim, principal and interest, thus to be settled amounted on December 31, 1946 to $83,961,920. The Atlantic Coast Line is a stranger seeking to acquire. From the standpoint of priorities it can not be considered to have a rank superior to that a junior creditor or a stockholder would have. Perhaps it should rank lower. And any right of a junior creditor or stockholder to participate in the assets of this bankrupt estate exists only if the senior obligations are satisfied in cash or securities having a value equal to their face amount. As the Supreme Court put it in *Insurance Group Committee* v. *Denver & R. G. W. R. Co.*, 67 S. Ct. 583, decided February 3, 1947:
>
> "'Until it can be contended with some show of reasonableness that the creditors senior to the creditors and stockholders whom the debtor represents here have received more in value than the face of their claims, the debtor's insistence on a reexamination of the plan is without substantial support. See *Northern Pacific Ry. Co.* v. *Boyd*, 228 U. S. 482;

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Group of Investors v. *Milwaukee R. Co.*, 318 U. S. 523, 541.'

"Cash and securities as here provided which have a value less than half the face amount of such claims do not meet this test. If the Atlantic Coast Line is to acquire this property it should be as a result of making the highest and best bid at a public sale at which other bidders, including the bondholders of the debtor, have a chance to compete.

"Aside from what seems to me a fatal legal defect in the report, I think it wrong on the merits. The principal controversy before us is whether the public interest will be best served by making this property a part of the Atlantic Coast Line system or by permitting it to remain independent of railroad control. On that issue much testimony was taken. Extensive briefs were filed and argument lasting 2 days was heard. The majority decide the issue in favor of the Atlantic Coast Line. I submit that the great preponderance of the pertinent testimony is to the contrary. The views of the persons served by the railroad, the persons dependent on it for a livelihood and of those who own its securities all have to be very largely disregarded in order to reach the majority conclusion. I would approve a plan which, in its main features, is substantially as proposed by the examiner. This would permit the property to be reorganized. The result of the present report, in my judgment, is more likely to be prolonged litigation."

2. These minority bondholders further adopt and submit, as their second objection to the so-called plan of reorganization, the following equally sound dissent of Commissioner Mahaffie from the six-commissioner majority

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Fourth Supplemental Report, in which dissent Chairman Lee and Commissioners Miller, Splawn and Mitchell joined:

"The *Boyd* case was decided April 28, 1913 (*Northern Pacific Ry. Co.* v. *Boyd*, 228 U. S. 482). In it the Court reaffirmed what is generally known as the strict priority rule. Under that rule a junior creditor or stockholder cannot benefit from assets being administered in bankruptcy proceedings unless all claims having priority are first fully satisfied. That principle has been consistently followed in subsequent decisions. I think it applicable here. And that if it be applied the acquisition now sought by the Atlantic Coast Line cannot be approved. As I pointed out in my dissent from the prior report, the Supreme Court in *Insurance Group Committee* v. *Denver & R. G. W. R. Co.*, 329 U. S. 607, decided February 3, 1947, spelled out for us the requirements as to the adequacy of compensation for prior claims as follows:

> " 'Until it can be contended with some show of reasonableness that the creditors senior to the creditors and stockholders whom the debtor represents here have received more in value than the face of their claims, the debtor's insistence on a reexamination of the plan is without substantial support. See *Northern Pacific Ry. Co.* v. *Boyd*, 228 U. S. 482; *Group of Investors* v. *Milwaukee R. Co.*, 318 U. S. 523, 541.'

"Here the Atlantic Coast Line is an applicant seeking to acquire the railroad property being reorganized. It is certainly in no more favored position than would be the holder of a junior claim or a stockholder. The creditors under the plan now approved receive much less 'in value than the face of their claims'. The report relies on the theory that the creditors are entitled

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to receive only the equivalent of the face amount of reorganization securities as fixed by us, which equivalent may be, and in this instance is, very much less in market value than either the face of the claims or the value of the property for reorganization purposes as found by this Commission. The latter figure is $40,500,000. This is based on the Commission's estimate of normal future earnings and is sometimes described as the capitalizable value of the property. The effect of the finding is that securities of that total amount may properly be issued in the reorganization. The report attributes to the Coast Line securities to be paid for the property a value of approximately $31,000,000. The question presented is whether the persons who normally would be entitled to receive the $40,500,000 of securities found by us to be properly issuable and the resulting control of the property may be required to give up that control and to accept instead Atlantic Coast Line securities having a value much less than that amount. On this point the holding of the Supreme Court in the *Boyd* case, *supra*, is of interest:

> "If the value of the road justifies the issuance of stock in exchange for old shares, the creditors were entitled to the benefit of that value, whether it was present or prospective, for dividends or only for purposes of control. In either event it was a right of property out of which the creditors were entitled to be paid before the stockholders could retain it for any purpose whatever (Page 508).

"The Boyd principle is the authoritative test of what is fair and equitable. It is difficult to see how it can be subordinated, as seems to be done in the report, to the Commission's finding of what is required by the

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public interest. It should be remembered that the 'fair and equitable' finding is required to be made not only by us but also by the court. Apparently to buttress the public interest finding the report adopts a novel theory as to what treatment legally satisfies a prior claim. After discussing at some length the prices paid by some of the security holders for some of their holdings and their possible profits on such holdings, the conclusion is reached that 'the preponderance of the creditors, instead of suffering losses, will reap substantial profits.' It is then found 'That the claim of the First and Refunding bondholders will under the approval plan be adequately satisfied is obvious'. This remarkable finding seems to be based on an appendix attached to the summary of the argument of counsel for the Coast Line. It is not of record in this proceeding. And even if the facts stated in it were proven they would not afford a valid basis for the finding above set out.

"As to the public interest finding on which the report is principally grounded, I reiterate what I said in my separate expression above referred to. The record as I view it supports independent ownership and operation by local people rather than acquisition by the Coast Line as being in the public interest. The report should so find. The representations of the persons served by the railroad, of those employed by it or otherwise dependent on it for a livelihood, and of the owners of its securities all have to be disregarded rather completely in order to arrive at the conclusions as to the public interest which the report reaches.

"I would vacate the order of April 8, 1947, and approve a plan substantially in accordance with that recommended by the examiner. That would permit the property to be reorganized. The report now issued is more likely merely to prolong the controversy."

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3. The so-called plan of reorganization is not a plan of reorganization within the meaning of Sec. 77 of the Bankruptcy Act, but is a scheme to expropriate debtor's properties, including cash, stocks, bonds and other intangibles. The expropriation is proposed to be accomplished by the device of prevailing upon the court to make decrees which would:

(a) Deprive the bondholders of their alternative rights to reorganize debtor among themselves or to have a judicial sale of the properties to satisfy the mortgage securing payment of the First and Refunding Bonds;

(b) Direct that the properties be sold to the Coast Line, discharged from the mortgage indebtedness exceeding $78,750,000, for a purchase price amounting nominally to $40,500,000 but having an actual value of only approximately $30,892,500, in that $36,375,000 of the nominal amount would be payable in Coast Line depreciated securities worth only approximately $26,767,500;

(c) Compel the bondholders to accept the Coast Line depreciated securities in payment of approximately 90% of the nominal amount of the purported compensation for the rights of which they would be deprived, which compulsory acceptance would change the status of the bondholders from that of voluntary creditors of debtor to that of involuntary creditors and stockholders of the Coast Line.

4. As to the minority bondholders, to permit the use of Sec. 77 as a device for expropriation by the Coast Line of the properties of debtor, under the guise of reorganization, would be unjust, unfair, inequitable and unconscionable.

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5. The scheme of expropriation would deny to debtor and the bondholders the relief which Sec. 77 was designed to afford them.

6. The scheme of expropriation is in direct contravention of the wishes and best interests of the only class having any interest in debtor and entitled to act for and represent it in voting on terms of reorganization.

7. The approval by the commission majorities of the scheme of expropriation is in effect an attempt to exercise, by perversion, the power of eminent domain, without jurisdiction or authority either to exercise or pervert it.

8. If Sec. 77 authorizes the scheme of expropriation, the section itself is not within but exceeds the bankruptcy power of Congress, is not a valid exercise of the power, and violates the due process and eminent domain clauses in the Fifth Amendment to the Constitution of the United States, by attempting to confer authority to deprive the bondholders of their property without due process of law, authority to take their property not for public use but in the "public interest," and authority to take it without just compensation. The proposed deprivation is sought to be justified solely on the ground that it would be more compatible with the public interest in transportation, but a deprivation on that ground, as distinguished from one designed to afford relief to debtors or creditors, or both, is wholly foreign to and exceeds the power of Congress "To establish * * * uniform laws on the subject of bankruptcies throughout the United States." That power can be exercised only for the purpose of affording relief to debtors or creditors, or both. It cannot be exercised on behalf of the general public for the sole purpose of promoting the public interest in transportation. It was not intended and cannot be utilized as a transportation power, nor to destroy a debtor-creditor relationship as a means of promoting the

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public interest. The attempt so to utilize it is not due process of law. If the bondholders are to be deprived of their property it must be done by taking the property under and in compliance with the eminent domain clause, which authorizes a taking for "public use" but not a taking in the "public interest". If Sec. 77 can be construed as authorizing the proposed taking of the bondholders' property for the sole purpose of promoting the public interest in transportation, it violates the eminent domain clause in that respect. The eminent domain clause also prohibits any taking, even for public use, unless just compensation be paid, meaning thereby the payment of compensation solely in money and not in any other medium. If Sec. 77 can be construed as authorizing the proposed taking of the bondholders' property for compensation of which approximately ninety per cent. would be payable in depreciated Coast Line securities, it also violates the eminent domain clause in that respect.

9. There are no considerations of public interest requiring consummation of the scheme of expropriation. The following conclusion of the five-commissioner majority in the Third Supplemental Report, affirmed by the six-commissioner majority in the Fourth Supplemental Report:

> "From all of the evidence we find and conclude that a plan of reorganization of the debtor vesting control of the reorganized company in the St. Joe Company will not be compatible with the public interest and that a plan vesting such control in the Coast Line, will, if other provisions of the plan are fair and equitable and otherwise meet the requirements of section 77 of the Bankruptcy Act, be consistent and compatible with the public interest."

is not sustained, but is negatived in all respects, by the subsidiary findings on which it is sought to be predicated,

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and by the evidence itself. The five-commissioner majority merely adopted, with a few totally unsubstantiated changes, the subsidiary findings theretofore made by the Examiner who saw and heard the witnesses and was better able to evaluate the evidence. On the same subsidiary findings, except for the unsubstantiated changes, and on the same evidence, the Examiner reached the directly opposite conclusion that:

> "For these reasons the Commission should find and conclude that a plan of reorganization of the debtor which shall vest control of the reorganized company in the first and refunding mortgage bondholders, with resulting control in the St. Joe Company, will, with provisions for proper recognition of the rights of minority interests after reorganization, be compatible with the public interest."

and in dissenting from the Fourth Supplemental Report, Commissioner Mahaffie, with the concurrence of four other Commissioners, also reached the following directly opposite conclusion:

> "As to the public interest finding on which the report is principally grounded, I reiterate what I said in my separate expression above referred to. The record as I view it supports independent ownership and operation by local people rather than acquisition by the Coast Line as being in the public interest. The report should so find."

By concurring in the conclusion last quoted, the other four Commissioners also concurred in the "separate expression" mentioned therein, which was as follows:

> "The principal controversy before us is whether the public interest will be best served by making this property a part of the Atlantic Coast Line system

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or by permitting it to remain independent of railroad control. On that issue much testimony was taken. Extensive briefs were filed and argument lasting 2 days was heard. The majority decide the issue in favor of the Atlantic Coast Line. I submit that the great preponderance of the pertinent testimony is to the contrary."

And in the Commission's Second Supplemental Report, in disapproving a proposal that the Coast Line be given control of debtor on terms which would have included a provision that the Coast Line guarantee the payment of interest and sinking fund requirements on $16,000,000 first mortgage 4% fixed-interest sinking fund bonds of debtor, a unanimous Commission said:

> "We are not convinced that the guaranties by the Coast Line of interest on the fixed-interest bonds now proposed and payments into the sinking fund warrant any change in our finding that no fixed-interest bonds should be issued in the reorganization. In its brief the St. Joe Paper Company refers to the net income realized by the Coast Line after payment of fixed charges, for the years 1932-1939, inclusive. Its statement and the reports filed by that company with us, show that in 5 of the 8 years, namely, 1932, 1933, 1934, 1935 and 1938, deficits were incurred. The Paper Company argues that this indicates that in depression years the Coast Line guaranties would be worthless and in other years unnecessary. It is sufficient to state that the proposed fixed charges for the debtor exceed those which we herein find to be proper, and would under the proposal result in an unwise increase in the fixed charges of the Coast Line. In our opinion, the guaranties by the Coast Line might, during a depression of any considerable duration, *contribute toward precipitating bankrupty pro-*

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> *ceedings for both carriers* even taking into consideration the possibility that certain economies might result from a common operation of the two lines. While we have expressed a conviction that consolidations of railroads under certain conditions are desirable in the public interest, the effect should be of reducing rather than increasing the fixed charges of the carriers involved." (Emphasis supplied.)

Thus it is that when the question of Coast Line Control was first considered, a unanimous Commission found that such control would not be compatible with the public interest, and thereafter, of the twelve experts who again passed on the public interest question, five Commissioners and the Examiner who heard the evidence disagreed with the other six Commissioners. Those facts deprive the majority conclusion of the weight ordinarily attached on the theory of "expertise" to administrative findings. For that reason, and also because the minority commissioners say there is no substantial evidence to support the majority conclusion, and that the great preponderance of the pertinent evidence is to the contrary, the majority conclusion is arbitrary, is wholly without substance or validity, is not entitled to any weight or regard, and fails to justify or even lend plausibility to the proposal that the bondholders be deprived of their natural right to have debtor rehabilitated by an adjustment of creditors' claims in a reorganization among themselves, on terms assuring the preservation, maintenance and operation of debtor, or a specially created successor, as a soundly financed continuing entity or enterprise, in which existing debtor-creditor relationship will be preserved to the extent reasonably justified by the value of debtors' properties.

10. Assuming but not admitting or conceding the soundness of the majority conclusion that it would not be compatible with the public interest in transportation to allow the St. Joe Company to assume control of debtor as the

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result of an independent reorganization among the bondholders, nevertheless, the conclusion does not justify depriving the minority bondholders of their natural right to participate in a reorganization of that nature.

11. Assuming but not admitting or conceding that the commission majorities are empowered to compel the majority bondholder to divest itself of its interest in debtor to a purchaser selected by the commission majorities, at a price fixed by the commission majorities, the purchase price to be paid approximately 10% in cash and the remainder in the purchaser's depreciated securities valued arbitrarily by the commission majorities, all because the commission majorities have concluded that it is not compatible with the public interest in transportation for the majority bondholder to control debtor, it does not follow that for those reasons the commission majorities also have power or jurisdiction to compel the minority bondholders to divest themselves of their interests in the properties to the same purchaser, at the same price, in the same manner, and upon the same terms. To follow that course would be to visit upon the minority the supposed sin of the majority, and to mete out to the innocent, without discrimination, the punishment to be visited upon the supposed sinner.

12. The commission majorities overlooked the fact that Sec. 77 was adopted for the relief of debtors and creditors, and not for the benefit of covetous strangers desiring to acquire the property of a debtor against the will and over the opposition of lien creditors, for a grossly inadequate consideration, and if the scheme of expropriation is to be effectuated, debtors and their creditors will be reluctant to invoke Sec. 77 for fear of the arbitrary power that might be exercised against them.

13. The conclusion of the commission majorities respecting compatibility with the public interest in transportation is arbitrary, in that it is very largely founded on

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the unsupported and uninformed argumentative assertions of persons who submitted arguments to the Commission but did not see fit to be sworn as witnesses nor to subject themselves to cross examination.

14. In reaching their conclusion respecting compatibility with the public interest in transportation, the commission majorities failed to consider or give due weight to the fact that these and other minority bondholders purchased bonds of debtor in good-faith reliance on the correctness and integrity of the Commission's Second Supplemental Report, and that the supposed considerations of compatibility with the public interest in transportation are not sufficiently clear and compelling to justify the complete about-face of the commission majorities and their overriding and abandonment of the plan approved in the Second Supplemental Report, to the detriment, damage and injury of minority bondholders who invested in reliance thereon.

15. Expropriation of debtor's properties in conformity with the scheme of the commission majorities would not obviate the supposed evil possibilities of St. Joe Company control. Consummation of the scheme of expropriation would merely deprive the St. Joe Company of control of a small independently operated railroad in exchange for a large voice in the Coast Line, in that the St. Joe Company would become the holder of approximately 10% of the Coast Line voting stock, and its supposed opportunity and inducement to influence shippers would be greatly magnified.

Under independent reorganization of debtor no duPont institution would have any financial interest in any connecting carrier. There would be no profit motive for influencing shippers to route over any particular connecting carrier. But the commission majorities propose to force on the St. Joe Company a most substantial financial interest in the Coast Line. If that be done, the Commission will

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have put the duPont interests under an impelling profit motive to influence shippers to route over the Coast Line in preference to the Seaboard and Southern. Their inducement to influence shippers would be far greater than under independent reorganization. So impelling a profit motive (to borrow the words of the five-commissioner majority) "given to a private institution of admittedly widespread power, presents a situation which might have grave consequences and against which it would be impossible adequately to protect the shipping public and the" Seaboard and Southern as connecting carriers.

16. The conclusion of the commission majorities respecting compatibility with the public interest in transportation obviously is founded on an unexplained desire to protect the Coast Line against a possible loss of business to the Seabord and Southern. Such protection is not a function of the Commission. There is no finding, nor could there be one, that a loss of business by the Coast Line to the Seaboard and Southern would adversely affect the adequacy of transportation service, or its essential conditions of economy and efficiency, or the appropriate provision and best use of transportation facilities. Neither is there a finding, nor could there be one, that a loss of business by the Coast Line to the Seaboard and Southern would adversely affect the national transportation system as a whole.

It is not within the province of the Commission to aid and assist one carrier to the detriment of others, nor to prevent and stifle competition where facilities for competitive service are in existence and available to the public. In basing their conclusion on those matters the commission majorities have gone far afield from the concept of "public interest" within the meaning of Sec. 77 and the Interstate Commerce Act. They have undertaken to deal with matters of "public concern" and "public welfare" as distinguished

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from the "public interest" in the maintenance of an adequate rail transportation system.

17. Respecting control of debtor by the St. Joe Company under independent reorganization, the five-commissioner majority expressly finds that no violation of the letter or spirit of the so-called commodities clause in the Interstate Commerce Act "would necessarily result" from such control. That finding is not disturbed by the six-commissioner majority. The majority finding with respect to "grave consequences" and inability to protect the shipping public and connecting carriers is so vague, indefinite, general and unspecific as to be a generalization of generalities, from which there emerges the single thought that the St. Joe Company would be in a position to influence shippers in routing over connecting carriers, and the shippers and connecting carriers could not be protected against the possibility. That is merely a finding of opportunity, and is in all respects insufficient as a finding that there exist considerations of public interest so clear and compelling as to warrant depriving the minority bondholders of their natural right to participate in an independent reorganization of debtor.

18. The arbitrary and obviously unfair and biased attitude of the commission majorities respecting the question of compatibility with the public interest in transportation is established clearly by the following contrasting statements in the five-commissioner majority discussion:

> "In view of the evidence that the Safe Deposit Company does not at this time actually exert any control over or management of the affairs of the Coast Line system, we cannot, on the present record, adopt the view that the Safe Deposit Company's power to do so, though coupled with a relatively small investment in the system properties, should be

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of importance in determining, whether the Coast Line plan is compatible with the public interest. • • •

"It is clear from the evidence presented that the St. Joe Company would be in a position, if it controlled the reorganized debtor, to so control its operation as to further its own interests and the other extensive Florida interests of the duPont estate to the ultimate disadvantage not only of the shippers and citizens of the State but to the detriment of the national transportation system as well. We find that adoption by the St. Joe Company of this attitude would inevitably have grave consequences from which it would be impossible to protect the shipping public and the connecting carriers."

By those statements the five-commissioner majority says, in so many words, that because the Safe Deposit Company did not, when the evidence was adduced, actually exert any control over the management of the affairs of the Coast Line system, its "power" to do so was of no importance in determining whether Coast Line operation of debtor is compatible with the public interest, but, on the other hand, the mere fact, standing alone, that independent reorganization would give the St. Joe Company "power" to control the operation of debtor is, in and of itself, sufficient to establish that St. Joe Company control would not be compatible with the public interest.

19. The scheme of expropriation violates the Sec. 77 provision that a plan of reorganization must "conform to the requirements of the law of the land regarding the participation of the various classes of creditors," by providing that money on which the bondholders have a lien shall be sold to the Coast Line. The law of the land requires that if debtor's properties are to be sold, the money on which the bondholders have a lien cannot be

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included among the assets to be sold, but must be distributed to them.

20. The scheme's provision that money on which the bondholders have a lien shall be sold to the Coast Line, also violates the decision of this Court rendered in this proceeding October 19, 1943, sustaining objections to the plan of reorganization theretofore certified by the Commission (*In re Florida East Coast Ry. Co.*, D. C. Fla., 52 F. Supp. 420). The Court there decided (52 F. Supp. 423):

> "This cash represents net earnings of the company, on which the bondholders have a lien. To the extent that it is prudently available, the bondholders are entitled to the benefit of this surplus cash, either by having it applied in an equitable manner in satisfaction of their claims, or by having it otherwise definitely allocated by the Commission as a component part of the reorganization plan, so that it may be equitably applied to the best advantage of all concerned."

The decision established the law of this proceeding to be that the bondholders, and only the bondholders, "are entitled to the benefit" of the money on which they have a lien, and must receive that benefit either by distribution of the money to them or by its definite allocation to their best advantage as a component part of a reorganization plan. The scheme violates the decision by providing that more than $22,725,551 of the money on which the bondholders have a lien shall not be distributed to them nor allocated to their advantage, but shall be allocated for the sole and exclusive use, benefit and advantage of the Coast Line, without increasing by so much as one cent debtor's so-called "value for reorganization purposes," and that so much thereof as shall not be expended by the Trustees shall be sold to the Coast Line, without increasing by so

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much as one cent the sale price fixed by the commission majorities.

21. The scheme of expropriation further violates the Sec. 77 provision that a plan of reorganization must "conform to the requirements of the law of the land regarding the participation of the various classes of creditors," by providing that all costs and expenses of the expropriation proceeding shall be paid from the money on which the bondholders have a lien.

22. The scheme of expropriation violates the Sec. 77 provision respecting valuation of debtor's properties. The scheme provides for a sale of the properties free from the lien of the mortgage securing the First and Refunding Bonds. By reason of that provision, Sec. 77 makes it mandatory that the properties, other than money on which the bondholders have a lien, be valued for purposes of sale, but that has never been done. There has been no determination or finding that the proposed sale price is the actual, or true, or real, or physical, or market, or intrinsic, or inherent, or sale value of the properties. To the contrary, the only determination or finding respecting value is that the proposed sale price represents the value of the properties "for reorganization purposes," meaning thereby the "maximum permissible capitalization" of debtor as a soundly financed continuing entity or enterprise in the event of a reorganization among the bondholders by adjustment of their claims on terms which would preserve existing debtor-creditor relationships to the extent reasonably justified by the value of the properties, including but not limited to the value inherent in their ownership and control. Since the scheme does not propose a reorganization having that end result, but proposes a sale of the properties and the destruction of existing debtor-creditor relationships, it does not comply with but

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violates the Sec. 77 requirement that the properties be valued for purposes of sale.

23. The scheme of expropriation further violates the Sec. 77 provision respecting valuation of debtor's properties by treating the "maximum permissible capitalization" of debtor, based solely on its estimated earning power, as being the value of debtor's properties for purposes of sale. If the properties are to be sold, debtor's estimated earning power cannot be the sole criterion of their sale value. To the contrary, in determining the sale price of the properties consideration also should have been but was not given to their present cost of reproduction new less depreciation, and to the original cost of the property when first devoted to public use, and to the actual investment of debtor in the properties, and to all other matters and things relevant to a determination of the sale value of a railroad as a profitable going concern.

24. The scheme of expropriation further violates the Sec. 77 provision respecting valuation of debtor's properties, by basing the "maximum permissible capitalization" of debtor on what is admittedly nothing more than a wild guess that "debtor's probable future annual income available for payment of interest in a normal year" will be $1,500,000. That amount is ludicrously inadequate, is not supported by any evidence, ignores all of the evidence, and was arrived at by arbitrarily discounting and discrediting the uncontradicted evidence relating to debtor's past earnings history and its future earnings prospects.

25. If the $40,500,000 "value for reorganization purposes" fixed by the Commission majorities is to be deemed the value of the properties for purposes of sale, the scheme does not provide for payment of that value. To the contrary, it proposes the payment of approximately $10,000,000

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less, in that the total estimated market value of the cash and securities sought to be foisted on the bondholders in payment for the properties is only approximately $30,892,500. On the other hand, if the $40,500,000 value for reorganization purposes is not to be deemed the value of the properties for purposes of sale, the scheme provides that the properties shall be sold for the equivalent of only approximately $30,892,500, without the commission majorities having found or determined that amount to be their value for purposes of sale, and without the commission majorities having made any subsidiary findings sustaining that value for purposes of sale.

26. If the $40,500,000 "maximum permissible capitalization" of debtor is the true value of debtor's properties for purposes of sale, the minority bondholders are, under any fair and equitable plan of reorganization, entitled to their proportionate vested interests therein, but the scheme of expropriation would deprive them of those vested interests.

27. The scheme's provisions respecting the proposed sale price of the properties are arbitrary, capricious, fanciful, and the outgrowth of vacillation and inconsistencies on the part of the commission majorities in attempting to justify an obviously indefensible result. The original five-commissioner majority approached the question by stating in the Third Supplemental Report that to "justify" the proposed compulsory private sale, in the face of the bondholders' opposition, "we must find, based on a convincing showing," that it would afford the bondholders

> "• • • a price in cash and Coast Line securities which will equal the value of all the properties of the debtor to be transferred to the Coast Line, taking into consideration such value to the creditors as may be

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> inherent in their opportunity otherwise to operate the property themselves and to recoup their losses from such future operation."

Notwithstanding that approach, no such findings respecting "price" and "value" were made, nor was there any attempt to make findings to that effect. Instead, the five-comissioner majority switched to the theory that it would determine the provisions of a plan which would afford the bondholders "the full equitable equivalent of the value of the securities which they now own," and made the following anomalous finding:

> "We find that the above securities and cash payment of the Coast Line, together with any other cash distributable to the first and refunding bondholders of the debtor's estate, will constitute, in view of the greater stability of earnings in the future, which should be realized in the unified properties under Coast Line control as compared with independent management, the equitable equivalent of the rights of these creditors in and to the property of the debtor."

That finding ignores completely the fact that the "distributable" cash to which it refers is money on which the bondholders have a lien, and which is to be distributed to them in any event, whether the proposed sale be consummated or debtor be reorganized by an adjustment of creditors' claims among the bondholders, hence that such distributable cash would not be furnished or provided by the Coast Line and could not in any sense be deemed a part of the proposed sale price. Necessarily, therefore, the effect of the finding is that in order for the bondholders to realize the "equitable equivalent" to which it refers, there must be added to the "price" fixed by the five-commissioner majority a sum of money equal to the money on which the bondholders have a

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lien, but the scheme makes no provision for the payment of any such additional sum of money. However, in the Fourth Supplemental Report the six-commissioner majority evidently realized the weaknesses, discrepancies and contradictions in the previous findings respecting "price in cash and Coast Line securities," "value of all the properties of the debtor to be transferred," "full equitable equivalent of the value of the securities," and "equitable equivalent of the rights of these creditors in and to the property of the debtor." That majority switched to a still further theory which the five dissenting Commissioners characterized as being both "novel" and "remarkable." The majority attempted to justify the proposed compulsory private sale, free of the lien of the mortgage securing the First and Refunding Bonds, at a price equivalent to only approximately $30,892,500, on two main grounds. The first is summarized in the following quotations from their discussion:

> "In any reorganization 'value for re-organization purposes' simply means 'maximum permissible capitalization', and not the quick worth of the property as measured by market appraisal of the value of securities representing that capitalization. • • •
>
> "The valuation of $40,500,000 is not intended to represent worth of the property such as would be determined by an inventory of the physical assets. As in all reorganization cases, in this proceeding we found the normal future annual earnings which might reasonably be expected (in this instance $1,500,000), then determined the amount of debt which such earnings can service, allowing some residue for return to stockholders. Value for reorganization purposes, physical value, and market value, are each entirely different, and we can concern ourselves only with the first."

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The second ground is embodied in the following:

> "In any event, the securities to be issued under the approved merger plan could be converted into an immediate profit of handsome proportions by the majority bondholder (St. Joe Paper Company) probably the next largest bondholder (Lynch interests) and, in fact, all of the bondholders except those relatively few (only one of which has come before us in this proceeding) who purchased their holdings in the solvent days of the railroad.
>
> "* * * the preponderance of the creditors, instead of suffering losses, will reap substantial profits. That the claim of the First and Refunding bondholders will under the approved plan be adequately satisfied is obvious."

The theories expressed in the quotations from the Fourth Supplemental Report are a far cry from the original approach of the five-commissioner majority that to "justify" the proposed compulsory private sale it was necessary for the Commission to find, "based on a convincing showing," that the bondholders would be paid "a price in cash and Coast Line securities which will equal the value of all the properties of the debtor to be transferred." Those theories also are not supported by any evidence but, as stated by both the six-commissioner majority and the five-commissioner minority, are founded solely on "an appendix" attached to the summary of the argument of counsel for the Coast Line, which appendix "included an obviously conservative estimate of the quick market values of the securities to be issued under the approved merger plan." The "quick market values" on which the six-commissioner majority relies so heavily are themselves nothing more than guesses respecting the possible market values, when issued, of securities which at present are merely proposed to be

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and have not yet been issued, and do not take into consideration the fact that most of such securities, if issued, would be issued in large blocks, and the "quick market values" of all of such securities would be vitally and adversely affected by the fact that no large block could ordinarily be marketed and turned into cash as readily as a small block, and where, as here, there would be only a limited market for such securities, offering a large block would depress the market and lower the price that could be obtained for them. It is clear that the omissions, inconsistencies, discrepancies, contradictions, conflicts and constantly shifting theories, in the discussions and findings of the commission majorities, pay lip-service to the Sec. 77 provisions respecting valuation, and to the "equitable equivalent" doctrine, but ignore and violate the fundamental requirements of both.

28. The scheme of expropriation violates the Sec. 77 provision that any sale "of all or any part of the property of the debtor * * * free from any lien" shall be "at not less than a fair upset price." The effect of the quoted provision is to require that any sale of debtor's properties free from the lien of the mortgage securing the First and Refunding Bonds shall be a judicial sale at which the highest bid, whether equal to or exceeding a fair upset price, shall be payable only in cash or by surrender and prorata credit of debtor's First and Refunding Bonds. Instead of complying with that requirement the scheme of expropriation violates it by providing for a private sale of debtor's properties, free from the lien of the mortgage, at a price amounting nominally to $40,500,000, of which $36,375,000 would be payable in the purchaser's depreciated securities.

29. The scheme of expropriation violates the Sec. 77 provision that a plan of reorganization must afford "due recognition to the rights of each class of creditors," in that it provides for the Court to enter decrees directing that debtor's properties be sold privately, free from the lien of

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the mortgage securing the First and Refunding Bonds, at a price which has not been found or determined to represent the sale value of the properties. If they are to be sold privately, free of the lien, the rights of the bondholders will not be afforded "due recognition" unless the sale is made at a price at least equal to their sale value.

30. The scheme of expropriation further violates the Sec. 77 provision that a plan of reorganization must afford "due recognition to the rights of each class of creditors," by providing that the bondholders shall be denied and deprived of their alternative rights to reorganize debtor among themselves or to have a judicial sale of the encumbered properties to satisfy the mortgage indebtedness. Section 77 is bottomed upon the theory of debtor rehabilitation by adjustment of creditors' claims in a reorganization among themselves, on terms assuring the preservation, maintenance and operation of debtor, or a specially created successor, as a soundly financed continuing entity or enterprise, in which existing debtor-creditor relationships will be preserved to the extent reasonably justified by the value of debtor's properties. To achieve that objective Sec. 77 provides expressly that a plan of reorganization must afford "due recognition to the rights of each class of creditors." The effect of the quoted provision is to require that any plan to reorganize debtor must afford "due recognition" to the bondholders' alternative rights to reorganize debtor among themselves or to have a judicial sale of the encumbered properties to satisfy the mortgage indebtedness. Instead of complying with the requirement that the alternative rights be afforded "due recognition," the scheme violates it by providing that the bondholders shall be deprived of both.

31. The scheme of expropriation was approved by the six-commissioner majority on the grossly erroneous theory that the Commission is empowered to do anything which

Congress has not prohibited. That is the effect of the following statement in their discussion:

"There is no prohibition in the Interstate Commerce Act against the merger of an insolvent railroad with a solvent railroad. We may, pursuant to our power under Section 77 of the Bankruptcy Act to deal with bankrupt railroads promulgate a plan which provides that the bankrupt shall be merged with a solvent corporation, and the court which has jurisdiction of the bankrupt's property, may confirm the plan. The solvent corporation here is willing. There is nothing in the Interstate Commerce Act to prohibit us from approving such a transaction.

"As applied to this proceeding the argument that the word 'merger', contained in subparagraph (b)(5) means a voluntary merger is beside the point. There is nothing of record to show that the merger of the Florida East Coast with the Atlantic Coast Line is objected to by either. The stockholders of the Florida East Coast have not objected. The objection comes from certain of its bondholders.

"Any contention that the merger must be voluntary is nullified by the 1935 amendment to Section 77, which provides, in subsection (e) that 'if the plan has not been accepted by the creditors and stockholders, the judge may, nevertheless, confirm the plan over their objection.' This provision is not restricted to any one of the several plans authorized in subsection (b). It refers to any plan authorized by that subsection. Subsection (b) specifically authorizes a plan which may provide for the merger of the debtor corporation with another corporation. Any involuntary aspects of such merger fade completely in the face of the power of the court to con-

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firm the plan providing for such merger over the objection of creditors or stockholders."

Another factor which the commission majorities elsewhere stated explicitly is that under the Sec. 77 provisions respecting the submission of a plan of reorganization for acceptance or rejection by the classes affected thereby, the bondholders constitute the sole and only class affected by the scheme, and the sole and only class having a right to accept or reject it.' The theory, therefore, is that so long as the Coast Line is "willing," and in the absence of any statutory prohibition, the Commission possesses jurisdiction to coerce the so-called "merger," notwithstanding the opposition of the only class having any interest in debtor and entitled to act for and represent it in voting on the question. The majority did not, and could not, point to any source of the extraordinary power claimed, but sought to exercise it, and urges that the Court should approve and confirm the scheme despite an adverse vote by the bondholders. The resulting anomaly is that the scheme could not be effectuated without approval by a majority of the Coast Line stockholders, who are neither creditors nor parties in interest, but the commission majority asserts that it can and should be effectuated notwithstanding its rejection by more than two-thirds in amount of the only class affected.

32. The scheme of expropriation was approved by the six-commissioner majority on the arbitrary assumption that subsections (b) and (f) of Sec. 77 have no relationship to each other and are not to be construed together. That is the effect of the following statement in their discussion:

"The opponents of the approved merger plan seek to read into subsection (b) language not contained therein. They suggest that the language 'another

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corporation' in subparagraph (b)(5) means a corporation organized to carry out the plan. No such qualification is suggested by the language itself and the statutory language must prevail. Had Congress intended to impose such a limitation on our power, the assumption is that it would have added the necessary language to make effective that restriction."

The subsection (b) provision that the means for execution of a plan may include the transfer of the debtor's properties to or the merger or consolidation of the debtor with "another corporation or corporations," is explained and limited by the subsection (f) reference to "any other corporation or corporations organized or to be organized for the purpose of carrying out the plan," and its further reference to transferring the property of the debtor to "the other corporation or corporations provided for by the plan." As so explained and limited the subsection (b) provision contemplates a transfer to or a merger or consolidation with a corporation or corporations organized or to be organized for the purpose of carrying out the plan. It does not contemplate a transfer to or a merger or consolidation with an existing corporation not organized for that purpose. The six-commissioner majority takes the position that because the limitation in subsection (f) does not appear in subsection (b) it has no application to the subsection (b) provision, but it is fundamental that all subsections in Sec. 77 must be construed together, and when a later subsection explains and limits apparently unqualified language in an earlier subsection, the limitation cannot be ignored or read out of the statute, but must be given effect. The scheme of expropriation is the end product of failure and refusal of the commission majorities to apply that rule.

33. The scheme of expropriation is not fair and equitable within the meaning of Sec. 77, but violates the

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absolute priority rule, in that it does not provide for full payment of the secured indebtedness evidenced by the First and Refunding Bonds, nor that the bondholders shall receive the full value of the mortgaged properties, including the values inherent in their ownership and control. To the contrary, it provides that the values inherent in ownership and control shall vest in the holder of an unsecured claim which is wholly without value and subordinate to all of debtor's other indebtedness, both secured and unsecured.

34. The Scheme of expropriation further violates the absolute priority rule by providing that the Coast Line, and not the bondholders, shall have the benefit of approximately $10,000,000 of the $40,500,000 "value for reorganization purposes" fixed by the commission majorities. That is the effect of the proposal that the bondholders be compelled to accept depreciated Coast Line securities worth only approximately $26,767,500 in payment of $36,375,000 of the so-called value for reorganization purposes. The value of the assets so acquired by the Coast Line would be approximately $10,000,000 more than the value of the assets delivered in payment, and the bondholders would receive nothing for the difference of approximately $10,000,000.

35. The scheme of expropriation further violates the absolute priority rule by failing to provide that the bondholders shall receive from that which is available for the satisfaction of their claims the equitable equivalent of the rights to be surrendered by them. The debtor itself and all of its properties, as well as the money on which the bondholders have a lien, are available for the satisfaction of the bondholders' claims, but the scheme does not provide that those items be so applied, nor that the bondholders shall receive therefrom the equitable equivalent of the rights which the commission majorities would require them

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to surrender. To the contrary, the commission majorities take the position that the *res* available for satisfaction of the claims is not comprised of debtor, its properties and the cash on which the bondholders have a lien, but is comprised solely of Coast Line cash and depreciated securities. From that fallacious premise the commission majorities draw the equally fallacious conclusion that because all of the Coast Line cash and depreciated securities would be distributed among the bondholders, their respective distributive shares would be the equitable equivalent of the rights they would be required to surrender. On that basis the commission majorities reach the startling conclusion that if all of debtor's properties, together with cash on which the bondholders have a lien, be sold to the Coast Line, the latter would "receive nothing" that is available for satisfaction of the bondholders' claims. That is utter nonsense. It is obvious that if the Coast Line is to get the *res* it will be getting "that which is available for the satisfaction" of the bondholders' claims, and if the Coast Line gets it the bondholders cannot receive from it the equitable equivalent of any rights they may surrender.

36. The scheme of expropriation further violates the absolute priority rule by misapplying the "equitable equivalent" doctrine, which goes no further than to permit the retirement of outstanding securities by the substitution therefor of new securities of the debtor, or of a specially created successor. The principle underlying the doctrine is that the new securities preserve existing debtor-creditor relationships to the extent reasonably justified by the value of the debtor's properties, and for that reason the new securities are the equitable equivalent of the old. The doctrine does not relate, and cannot apply, to a sale of the properties of a debtor. It does not contemplate or permit a substitution of securities as a device for selling the properties and destroying existing debtor-creditor relationships.

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37. The scheme of expropriation further violates the absolute priority rule by providing that the value inherent in the operation and control of debtor, or a specially created successor, as a continuing entity or enterprise, shall be sold to the Coast Line for a consideration which is so tenuous, highly speculative and shockingly inadequate as to be no consideration at all. The plan approved by the Commission in its Second Supplemental Report, and the modified plan recommended by the Examiner in his proposed Third Supplemental Report, each valued debtor at $40,500,000 provided for debtor to issue to the bondholders securities having par and stated values totaling that amount, and further provided that they receive the benefit of all money on which they have a lien, by definite allocation of a part thereof to their advantage as a component part of the plan and the distribution to them of any balance. Under the plan so approved, and the modified plan so recommended, the bondholders would have received the sole and exclusive benefit of all money on which they have a lien, and also would have received all securities provided to be issued by debtor, including all of its common stock. The issuance of all of the common stock to the bondholders would have made them the owners of any and all equity in debtor, and also would have made them the owners of any and all value inherent in the operation and control of debtor as a continuing entity or enterprise. The market values of the securities so provided to be issued to the bondholders were immaterial and unimportant, because the bondholders, regardless of such market values, would have been entitled to all net earnings of debtor after interest and taxes, and could have operated and controlled debtor to their best advantage. The fact that by far the major part of the money on which the bondholders have a lien was allocated as a component part of the plan so approved, and of the modified plan so recommended, also was immaterial and unimportant, because the allocation would have redounded to the sole and

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exclusive benefit and advantage of the bondholders, in that the money would have been used for the improvement and betterment of the properties and such use thereof would have been for the purpose of increasing the value of the properties or of increasing debtor's net earnings, or both, and the increased value of the properties or the increased net earnings, or both, would have redounded to the sole and exclusive benefit and advantage of the bondholders by increasing the value of their securities or increasing the return thereon, or both. Under the scheme of expropriation the value inherent in the operation and control of debtor as a continuing entity or enterprise, including all values anticipated to accrue from the use for improvements and betterments of by far the major part of the money on which the bondholders have a lien, would be sold to the Coast Line for a consideration, if it can be called such, comprised solely of the following four elements: (1) Payment by the Coast Line to the bondholders of $4,125,000 cash in lieu of the issuance by debtor to the bondholders of securities having par or stated values totaling that amount; (2) the issuance by the Coast Line to the bondholders of depreciated Coast Line securities having par and stated values totaling $36,375,000 in lieu of the issuance by debtor to the bondholders of securities having par and stated values totaling that amount; (3) the differences between the types and characters of securities which debtor would have issued to the bondholders, and those which the scheme of expropriation provides shall be issued by the Coast Line to the bondholders; and (4) the assumed "greater stability of earnings in the future, which should be realized in the unified properties under Coast Line control as compared with independent management." Those elements of consideration, if they can be deemed such, are affected by so many unforeseeable and unpredictable questions of inflation, variable value of money, variable market values of securities, variable interest rates, experience, ability, judgment and integrity of management,

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best and most economical utilization of transportation facilities, routings of freight and passenger traffic, loyalties and preferences of shippers and the traveling public, loyalties and efficiency of employees, economic growth and development of the territory served by debtor, population trends in that territory, cooperation and good will of public and semipublic bodies and organizations in the territory, and other intangibles too numerous to mention, that they are wholly and completely incapable of appraisal or even of informed guesses respecting evaluation, and are too tenuous, unsubstantial, highly speculative and shockingly inadequate to constitute even a semblance of consideration for the proposed sale to the Coast Line of the value inherent in the operation and control of debtor, or a specially created successor, as a continuing entity or enterprise. The abortive attempts of the commission majorities to make findings to the contrary are negatived by the following statement in the discussion of the five-commissioner majority:

> "The conclusion is obvious that in periods of moderate prosperity for the debtor (and especially so in years of very large earnings), the existing first and refunding bondholders would receive a greater return on the new securities allocable under the previously approved plan for independent operation than under the Coast Line plan, while in periods of low earnings the annual return would be greater under the merged operation, providing the combined earnings of the merged companies were sufficient to cover the dividend on the preferred stock offered under the Coast Line plan to the debtor's first and refunding bondholders. This in effect is conceded by the 5-percent committee which advocates approval of the Coast Line plan. This committee contends, however, that the Commission cannot logically assume earnings of the debtor in the future in excess of the 'normal year' estimate of $1,500,000. This posi-

tion of the committee is unwarranted. There is no assumption that in certain years the normal year estimate may not be greatly exceeded although not fully realized in other years."

38. The scheme of expropriation further violates the absolute priority rule in that it would scale down the ownership by the bondholders of common stock in a railroad to such an extent that even under the most favorable conditions and the best possible management of the Coast Line, the bondholders could not possibly recoup any such part of the indebtedness now owing to them as would be cancelled and discharged without payment.

39. The scheme of expropriation further violates the absolute priority rule in that it would deprive the bondholders of any reasonable opportunity of recouping, through entire ownership and control of debtor, any such part of the indebtedness now owing to them as would be cancelled and discharged without payment.

40. The scheme of expropriation further violates the absolute priority rule by providing, with respect to debtor's future earnings, that the payment therefrom of all fixed charges of the Coast Line shall take priority over payment of the Coast Line's depreciated income bonds proposed to be delivered to debtor's present bondholders.

41. The Coast Line went before the Commission, and now comes into a court of equity, with unclean hands, and should be debarred from any participation of any kind in any plan to reorganize debtor.

WHEREFORE, these minority bondholders pray that their objections to the scheme of expropriation be sustained, that the scheme be disapproved, that the Court take judicial

notice, in the light of all the existing circumstances, that there is undue delay in a reasonably expeditious reorganization of debtor, and that the reorganization proceeding be dismissed because of such delay.

Respectfully submitted,

WALTON, HUBBARD, SCHROEDER, LANTAFF & ATKINS,
Attorneys for W. G. Welbon, et al.,

By MILLER WALTON,
Of Counsel.

Addresses:

WALTON, HUBBARD, SCHROEDER,
LANTAFF & ATKINS,
MILLER WALTON,
913 Alfred I. duPont Building,
Miami 32, Florida.

BLEED THROUGH

Motion to Refer Proceedings Back to the Interstate Commerce Commission for Plan of Reorganization, and Objections to the Plan Submitted by the Interstate Commerce Commission.

IN THE

DISTRICT COURT OF THE UNITED STATES,

FOR THE SOUTHERN DISTRICT OF FLORIDA.

In Proceedings for the Reorganization of a Railway.

IN THE MATTER *of* FLORIDA EAST COAST RAILWAY COMPANY, Debtor.	No. 4827-J.

COMES NOW F. K. CONN, who is the owner and holder of First and Refunding Mortgage Bonds of Florida East Coast Railway Company and holds power of attorney to act in these proceedings for other such owners and holders as set out in the Petition for Intervention filed with this motion and, therefore, is a creditor with the right to be heard under Section 77 (c) (13) of the Bankruptcy Act and the order of this Court of April 29, 1948, and respectfully moves the Court, as an interested party under Section 77 (e) of such Act, to disapprove the plan of reorganization submitted by the Interstate Commerce Commission in this Court in these proceedings, and filed in this cause under its Finance Docket number 13170, and to refer the proceedings back to the Interstate Commerce Commission for its reconsideration; and the said F. K. Conn states as his objections to the aforesaid plan of reorganization cer-

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tified to this court by the Interstate Commerce Commission the following:

I.

The plan fails to meet the statutory requirements of Section 77 (e) of the Bankruptcy Act in the following respects:

A. The plan is not fair and equitable, it discriminates unfairly between classes of creditors, it does not afford due recognition to the rights of the First and Refunding Mortgage bondholders as a class of creditors, and it fails to conform to the law of the land regarding the participation of various classes of creditors and stockholders (both in the narrower sense requiring strict priority as defined in Federal equity proceedings and also in the broader constitutional sense); and more specifically as follows:

1. The plan subordinates the rights and interests of the First and Refunding Mortgage bondholders to the rights and interests of the Atlantic Coast Line, which railroad is variously described as: a purchaser seeking to acquire the properties of the debtor (Third Supplemental Report, sheet 91; Fourth Supplemental Report, sheet 15 (dissent)); a connecting trunk line, willing to operate the debtor as part of its system (Fourth Supplemental Report, sheet 12); the transferee corporation (Fourth Supplemental Report, sheet 6); or, at best, an unsecured creditor (Third Supplemental Report, sheets 6, 66 and 67). In none of these capacities does the Atlantic Coast Line have the rights of a senior creditor.

2. Discrimination between classes of creditors and stockholders is shown in the following classification:

(a) *Creditors who, under the plan, receive more than the face value of their claim.*

Atlantic Coast Line Railway Company. The Coast Line, an unsecured creditor, is to receive for

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its $1,900,000 claim, a property with an admitted worth of $40,500,000, in return for its securities of a market value of less than $31,000,000, or a return of $9,500,000 on its $1,900,000 unsecured claim (Fourth Supplemental Report, sheets 6, 7 and 8; Third Supplemental Report, sheet 6).

(b) *Creditors receiving claims in full in cash.*

First Mortgage 4½% Bonds (Third Supplemental Order, Page 10; Third Supplemental Report, Sheet 84).

(c) *Creditors receiving part of their claim.*

First and Refunding Mortgage Bonds (5's of '74). These creditors receive approximately 310/840ths of the amount of their claim and only 310/405ths of the admitted value of the property subject to that claim (Fourth Supplemental Report, sheets 7 and 8, and sheet 15 (dissent)).

(d) *Creditors and stockholders who will receive nothing.*

All unsecured creditors except the Atlantic Coast Line and all stockholders (Third Supplemental Report, sheet 85).

3. The plan permanently deprives the First and Refunding Mortgage bondholders as a class of creditors of the right to obtain any potential recoupment of their total claim from the operation of the assets on which their securities are a lien. A deprivation of that right is not equitably counterbalanced by the substitution of an alternative to recoup the unpaid claim from the operation of assets in which those creditors never invested (Fourth Supplemental Report, sheet 7).

4. The plan does not provide for strict dollar priority; for the proposed plan must, in order to be effective, take dollar values away from the First and Refunding Mortgage

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bondholders and give them to the Coast Line. If the Coast Line did not get some bonus value in this transaction it would not be interested in the plan, and it could not be forced by the Interstate Commerce Commission to accede to it.

5. The plan does not provide that all secured creditors retain the interest and rights to which they are entitled, this being an attempt by a public body to initiate and force a plan (rather than to approve a plan negotiated by private parties). In so doing the Commission has deprived creditors of substantial rights; and in this case the strict priority doctrine is buttressed by the constitutional prohibitions of the Fifth Amendment.

II.

The plan fails to meet the statutory definition of a plan of reorganization required to be developed by the Interstate Commerce Commission (Bankruptcy Act, sections 77(b) and 77(e)):

A. Although the plan provides a means of execution, the means provided violates the requirements of the Act:

(1) by providing for a sale of the properties of the debtor at less than a fair upset price (Third Supplemental Report, sheet 13); and

(2) by attempting to force a merger or consolidation (Third Supplemental Order, page 1, paragraph II).

(s) Howard P. Macfarlane,
Attorney for F. K. Conn,
Address: 215 Madison Street,
(P. O. Box 1531),
Tampa, Florida.

Of Counsel

Macfarlane, Ferguson, Allison & Kelly.

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Objections of Chemical Bank & Trust Company and Howard B. Smith, as Successor Trustees under the First and Refunding Mortgage of the Debtor, dated September 1, 1924, to the Plan of Reorganization of the Debtor.

IN THE

DISTRICT COURT OF THE UNITED STATES,

FOR THE SOUTHERN DISTRICT OF FLORIDA.

In Proceedings for the Reorganization of a Railroad.

IN THE MATTER *of* FLORIDA EAST COAST RAILWAY COMPANY, Debtor.	No. 4827-J.

To the Honorable Louie W. Strum, Judge of said Court:

Now come Chemical Bank & Trust Company and Howard B. Smith, as Successor Trustees under the First and Refunding Mortgage of the Debtor, dated September 1, 1924 (hereinafter called the Mortgage Trustees), and pursuant to order of this Court dated April 29, 1948, file their objections to the plan of reorganization of the Debtor as approved in the reports and orders of the Interstate Commerce Commission dated April 8, 1947, and March 25, 1948 (herein called the Plan), and to the findings made in said reports and orders, as follows:

1. The Plan does not comply with the provisions of Section 77 of the Bankruptcy Act.

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2. The Plan is not fair and equitable in that it fails to accord to creditors, including holders of the Debtor's First and Refunding Mortgage Bonds, their lawful rights under the principles of law known generally as the rule of the *Boyd* case.

3. The Plan is not fair and equitable in that it permits an unsecured creditor of the Debtor to acquire the entire property of the Debtor without making payment of the prior claims against such property, *i.e.*, the claims of the holders of the Debtor's First and Refunding Mortgage Bonds.

4. The Plan is not fair and equitable, in that it requires a sale of the property of the Debtor to Atlantic Coast Line Railroad Company for a price less than (a) the value of such property, as determined by the Interstate Commerce Commission and (b) the fair upset price for such property, as determined by the Interstate Commerce Commission.

5. The Plan is not fair and equitable, because it does not make adequate provision for repayment to the holders of First and Refunding Mortgage Bonds of moneys advanced for their account for improvement of the Debtor's property.

6. The Commission has no power, under Section 77 of the Bankruptcy Act or otherwise, to compel holders of First and Refunding Mortgage Bonds to permit their property to be merged or consolidated with the property of another railroad corporation, not included in the proceedings under Section 77, or to be sold to such other railroad corporation.

7. If Section 77 of the Bankruptcy Act were construed to confer power on the Commission to compel such a merger, consolidation or sale, particularly on the terms con-

templated by the Plan, Section 77 of the Bankruptcy Act would be unconstitutional.

8. If Section 77 of the Bankruptcy Act and the Interstate Commerce Act, or either of them, are construed to authorize the Commission to compel such a merger, consolidation or sale, then said statutes and the action of the Commission thereunder embodied in the Plan would (a) deprive the holders of First and Refunding Mortgage Bonds of their property without due process of law and (b) take the property of the bondholders without just compensation, in violation of the Fifth Amendment of the Constitution of the United States.

WHEREFORE, the Mortgage Trustees respectfully pray:

(a) That the Court disapprove the Plan and refer the proceedings back to the Interstate Commerce Commission; and

(b) That such other and further relief be granted in the premises as shall be just and equitable.

Dated June 30, 1948.

Respectfully submitted,

ADAIR, KENT, ASHBY & MCNATT,
/s/ CRAVATH, SWAINE & MOORE,
Attorneys for Chemical Bank & Trust Company and Howard B. Smith, as Trustees.

/s/ Henry P. Adair
HENRY P. ADAIR

/s/ Leonard D. Adkins
LEONARD D. ADKINS,
Of Counsel.

Objections of The New York Trust Company, as Trustee of Florida East Coast Railway Equipment Trust Series D, to Plan of Reorganization of the Debtor Certified by the Interstate Commerce Commission, and Claims of said Trustee for Equitable Treatment.

IN THE

DISTRICT COURT OF THE UNITED STATES.

FOR THE SOUTHERN DISTRICT OF FLORIDA.

In Proceedings for the Reorganization of a Railroad

IN THE MATTER

of

FLORIDA EAST COAST RAILWAY COMPANY,

Debtor.

No. 4827-J.

To the Honorable Judge of the District Court of the United States for the Southern District of Florida:

Now comes The New York Trust Company, as Trustee of Florida East Coast Railway Equipment Trust Series D and, pursuant to the order of this Court dated April 29, 1948, in the above proceeding, submits the following detailed and specific objections to the Plan of Reorganization of the Debtor, certified to this Court on April 2, 1948, by the Interstate Commerce Commission, and submits the following claims for equitable treatments:

I.

The proposed Plan of Reorganization (herein referred to as the "Plan") is unfair and inequitable to holders of

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unsecured claims in that it provides that the interests of holders of such claims against the Debtor which are not entitled to priority over one or more of the mortgages of the Debtor have no value and that nothing shall be distributed to them in the reorganization. Such provision is based on an erroneous conclusion of law by the Interstate Commerce Commission on an issue of law which was not within its province to decide, namely, its erroneous conclusion of law that certain assets of unadjudicated status (listed at 267 I. C. C. p. 366) were subject to the Debtor's mortgages and were not free assets.

II.

The Plan is also unfair and inequitable in the treatment it proposes for the claims of unsecured creditors in the event that this Court finds that there are assets of the Debtor which are not subject to the liens of existing mortgages and which are of sufficient value to be practicably apportioned among the holders of unsecured claims. In view of the relatively small amounts involved and the desirability of avoiding fractional securities, the distribution to unsecured creditors should be in cash rather than securities.

III.

The Plan is unfair and inequitable to The New York Trust Company, as Trustee as aforesaid, a holder of an allowed unsecured claim against the Debtor in the amount of $487,418.32, and discriminates unfairly against the New York Trust Company, as Trustee as aforesaid, in that the Plan provides, in the event of any distribution to holders of allowed unsecured claims, that the securities to be so distributed shall be ratably distributed among the holders of such claims. Under the principles laid down in *Taylor v. Standard Gas and Electric Co.*, 306 U. S. 307 (1939), and *In re Loewer's Gambrinus Brewery Co., Inc.*, C. C. A.,

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2nd, March 31, 1948 (16 U. S. Law Week 2486), the $1,900,000 claim of the Atlantic Coast Line as an unsecured creditor, held by virtue of assignments from Florida East Coast Car Ferry Company and the Flagler Estate, affiliates of the Debtor, should not be treated as of equal rank and priority with the unsecured claim of The New York Trust Company, as Trustee as aforesaid.

IV.

The Plan does not meet the requirements of subsection (e) of Section 77 of the Federal Bankruptcy Act as amended.

V.

To provide equitable treatment for The New York Trust Company, as Trustee as aforesaid, the Plan should provide that:

(a) The interests of The New York Trust Company as the holder of an unsecured claim against the Debtor have value;

(b) The distribution to the holders of unsecured claims in recognition of their interests in the free assets should be in cash rather than in securities;

(c) The claim of the Atlantic Coast Line as an unsecured creditor should be subordinated to the claim of The New York Trust Company, as Trustee as aforesaid.

WHEREFORE, The New York Trust Company, as Trustee as aforesaid, prays that this Court (1) sustain its objections to the Plan and support its claim for equitable treatment; (2) determine that the Plan certified by the Interstate Commerce Commission does not comply with the requirements of Section 77, is not fair or equitable to the unsecured creditors of the Debtor, does not afford due recognition

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of the rights of The New York Trust Company, as Trustee, as such an unsecured creditor, discriminates unfairly against The New York Trust Company, as Trustee, as an unsecured creditor, and fails to conform to the requirements of the law of the land regarding the participation of unsecured creditors; (3) enter an order in which this Court will refer the proceedings back to the Interstate Commerce Commission for further action consistent with the above objections and claims; and (4) grant to The New York Trust Company, as Trustee, such other and further relief as it may hereinafter pray for and as to this Court may seem proper.

Dated: June 28, 1948.

Respectfully submitted,

(Sgd) Rogers, Towers & Bailey,
Consolidated Building,
Jacksonville, Florida.

(Sgd) Debevoise, Plimpton & McLean,
20 Exchange Place,
New York 5, N. Y.

Attorneys for The New York Trust Company, as Trustee of Florida East Coast Railway Equipment Trust Series D.

(Sgd) William H. Rogers,
(Sgd) Francis T. P. Plimpton,
(Sgd) Oscar M. Ruebhausen,
Of Counsel.

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Objections of Seaboard Air Line Railroad Company to the Plan of Reorganization of the Debtor.

IN THE

DISTRICT COURT OF THE UNITED STATES,

FOR THE SOUTHERN DISTRICT OF FLORIDA.

In Proceedings for the Reorganization of a Railroad.

IN THE MATTER *of* FLORIDA EAST COAST RAILWAY COMPANY, Debtor.	No. 4827-J.

To the Honorable Louie W. Strum, Judge of said Court:

Now comes Seaboard Air line Railroad Company, intervenor herein, and pursuant to order of this Court dated April 29, 1948, files its OBJECTIONS to the plan of reorganization of the Debtor, and the findings with respect thereto, as approved and set forth in the reports and orders of the Interstate Commerce Commission dated April 8, 1947, and March 25, 1948, (herein called the Plan and Findings) as follows:

1. The plan is not compatible with the public interest.

2. The record certified to this Court by the Interstate Commerce Commission by certificate dated April 2, 1948, does not contain material evidence sufficient to validate the findings in said reports of said Commission as to the compatibility of the plan with the public interest.

Objections of Seaboard Air Line Railroad Company.

3. The plan would substantially and adversely affect the public interest in that the vesting of the properties of the Debtor in Atlantic Coast Line Railroad Company as provided in said plan would result in impairment of:

(a) The revenues of other trunk-line railroads now competing at the Jacksonville gateway,

(b) The present competitive conditions, favorable to the public interest, which currently prevail between the trunk-lines at the Jacksonville gateway, and

(c) The ability of the other trunk-line connections of the Debtor to continue their present standards of service to the public.

4. The record certified to this Court by the Interstate Commerce Commission by certificate dated April 2, 1948, does not contain evidence sufficient to constitute a basis upon which this Court can be satisfied, within the meaning of subsection (e) of Section 77 of the Bankruptcy Act as amended, that the plan meets the statutory requirements of said subsection (e).

5. The plan is not a lawful plan under the Bankruptcy Act as amended in that it proposes the vesting in Atlantic Coast Line Railroad Company of properties of the Debtor without first providing full and complete satisfaction of the lawful claims of the various classes of creditors of the Debtor in the order of their respective priorities.

6. The plan is not feasible in that it cannot lawfully be effectuated, over the objection of a single creditor, in so far as it proposes to vest properties of the Debtor in Atlantic Coast Line Railroad Company on the terms stated therein.

Objections of Seaboard Air Line Railroad Company.

7. The plan is not fair and equitable within the meaning of Section 77 of the Bankruptcy Act as amended.

8. The plan is not fair and equitable in that it fails to accord to creditors, including holders of the Debtor's First and Refunding Mortgage Bonds, their lawful rights under the principles of law known generally as the rule of the Boyd case.

9. The plan discriminates unfairly against the creditors of the Debtor and in favor of Atlantic Coast Line Railroad Company.

10. The plan does not conform to the law of the land regarding the participation of the various classes of creditors in that, without first lawfully satisfying the claims of creditors, it accords valuable interests in the Debtor's properties to Atlantic Coast Line Railroad Company.

11. The plan, by reason of the terms thereof as to vesting of properties of the Debtor in Atlantic Coast Line Railroad Company, and by reason of the respective treatment therein accorded creditors of the Debtor and Atlantic Coast Line Railroad Company, would constitute a taking of property of creditors of the Debtor without due process of law contrary to the Fifth Amendment to the Constitution of the United States of America.

WHEREFORE, intervenor respectfully prays:

(a) That the Court disapprove the said plan of reorganization;

(b) That the Court refer the proceedings back to the Interstate Commerce Commission for the formulation of a plan consistent with the provisions of Section 77 of the Bankruptcy Act as amended and consistent with the law of the land, and

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(c) That such other and further relief be granted in the premises as shall be just and equitable.

Dated June 28, 1948.

Respectfully submitted,

FLEMING, JONES, SCOTT & BOTTS,
Room 1712, Barnett Bank Building,
Jacksonville, Florida.

WILLKIE OWEN FARR GALLAGHER & WALTON,
15 Broad Street,
New York, N. Y.

Attorneys for Intervenors, Seaboard Air Line Railroad Company.

By G. W. BOTTS,
Of Counsel.

JAMES B. McDONOUGH, JR.,
HAROLD J. GALLAGHER,
WALTER H. BROWN, JR.,
G. W. BOTTS,
Of Counsel.

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Objections by Interveners Southern Railway System Lines to the Modified Plan of Reorganization of the Debtor, Approved by the Interstate Commerce Commission.

IN THE

DISTRICT COURT OF THE UNITED STATES,

FOR THE SOUTHERN DISTRICT OF FLORIDA.

In Proceedings for the Reorganization of a Railroad.

IN THE MATTER *of* FLORIDA EAST COAST RAILWAY COMPANY, Debtor.	No. 4827-J.

Come now Southern Railway Company, The Alabama Great Southern Railroad Company, The Cincinnati, New Orleans and Texas Pacific Railway Company, Georgia Southern and Florida Railway Company, New Orleans and Northeastern Railroad Company, and St. Johns River Terminal Company, hereinafter called "these interveners" or "Southern Railway System Lines," and, pursuant to the order of this court entered and filed herein on April 29, 1948, file these their objections to the modified plan of reorganization of the debtor, approved by the Interstate Commerce Commission in its Third Supplemental Report and Order, dated April 8, 1947, in Finance Docket No. 13170, Florida East Coast Railway Company Reorganization, 267 I. C. C. 295, which approval was reaffirmed in its Fourth Supplemental Report and Order, in the same proceeding, decided March 25, 1948.

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Objections of Southern Railway System Lines.

FIRST OBJECTION.

In the said proceeding before the Commission, Atlantic Coast Line Railroad Company intervened as an outsider and proposed a plan for the reorganization of the debtor whereby Atlantic Coast Line Railroad Company would acquire the railroad properties of the debtor and merge the same with its own railroad properties. The modified plan of reorganization approved by the Commission contemplates a forced merger or consolidation of the corporate entities, properties and operations of the two said carriers by railroad, without the consent of the debtor or of anyone legally authorized to consent for it, contrary to the intent, purpose and effect of Sec. 5(2) of the Interstate Commerce Act and of Sec. 77 of the Bankruptcy Act. In the said reports and orders, the Commission held that it had the power under Sec. 77 of the Bankruptcy Act to provide for such forced and involuntary merger of one carrier by railroad with another carrier by railroad, although admitting that it had no such power under Sec. 5(2) of the Interstate Commerce Act. These interveners respectfully submit that the Interstate Commerce Act, and particularly Sec. 5(2) thereof, confers no authority upon the Commission or upon any other agency or tribunal, administrative or judicial, to compel such a consolidation or merger of carriers by railroad, their properties, operations or corporate entities, without the mutual consent of each such carrier, and that, properly construed, Sec. 77 of the Bankruptcy Act contemplates no extension of the powers of the Commission with regard to a merger or consolidation of carriers by railroad beyond those conferred by Sec. 5(2) of the Interstate Commerce Act. Wherefore, these interveners show that the said modified plan of reorganization of the debtor was approved by the Commission without authority of law and is illegal.

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Objections of Southern Railway System Lines.

SECOND OBJECTION.

The said illegal plan of reorganization of the debtor and forced merger of the debtor with Atlantic Coast Line Railroad Company was approved by the Commission in its said Third Supplemental Report and Order, by a bare majority of the Commissioners participating in the decision, five Commissioners voting for approval and four Commissioners dissenting. The same plan of reorganization was approved by the Commission, after reargument, in its Fourth Supplemental Report and Order, again by a bare majority of the Commission, six Commissioners voting for approval and five dissenting. By the same bare majority of five to four, the Commission, in its said Third Supplemental Report and Order, made the ultimate finding of fact that the said modified plan would be compatible with the public interest, and by the same bare majority of six to five, the Commission, in its said Fourth Supplemental Report and Order, reaffirmed the finding that the said plan would be compatible with the public interest. As pointed out in the dissenting opinions to said reports and orders, the said ultimate finding of compatibility with the public interest was made by the majority in disregard of the great preponderance of the pertinent testimony on the record and, hence, contrary to pertinent legal principles. In view of the sharp division between equally expert Commissioners, these interveners respectfully show that the findings and conclusions of the bare majority of the Commission come to this court for review deprived of the weight ordinarily attached to administrative findings on the theory of "expertise" and that, therefore, this court should review the said ultimate finding and disapprove the modified plan of reorganization of the debtor as incompatible with the public interest and, hence, as in violation of legal standards.

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THIRD OBJECTION.

The Commission, in its said Third Supplemental Report and Order, by the said bare majority of five to four, made a finding, reaffirmed by a bare majority of six to five in its said Fourth Supplemental Report and Order, that the effect of the approved merger of the debtor with Atlantic Coast Line Railroad Company upon the revenues of these interveners, if any, would not adversely affect the public interest; the said finding was made and reaffirmed without material evidence to support it, in disregard of substantially uncontradicted evidence to the contrary, in disregard of the preponderant relevant evidence before the Commission and, hence, contrary to legal standards.

FOURTH OBJECTION.

The overwhelming preponderance of the evidence before the Commission in said proceeding, now certified to this court, shows that the said forced and involuntary merger of the debtor and its railroad properties and operations with Atlantic Coast Line Railroad Company and its properties and operations, will result in the extension of the railroad lines of Atlantic Coast Line Railroad Company from Jacksonville, Florida, down the east coast of Florida for the length of the present lines of the debtor to Florida City, Florida, will thus give Atlantic Coast Line Railroad Company the power to control for itself and for its lines of railroad much of the traffic now interchanged between the debtor and Southern Railway Company, Georgia Southern and Florida Railway Company, and St. Johns River Terminal Company at Jacksonville and Palatka, Florida, will deprive Southern Railway Company, Georgia Southern and Florida Railway Company, and St. Johns River Terminal Company of their present opportunity

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freely to compete with Atlantic Coast Line Railroad Company for such interchange traffic as now interchanged by debtor's independent line and operation, thus depriving those companies and the other Southern Railway System lines of these interveners of large revenues from such present competitive traffic, and as a result will seriously prejudice the public interest in the preservation of said competition, by reason whereof this court should hold that the said modified plan of reorganization is incompatible with the public interest, contrary to legal standards, and illegal.

WHEREFORE, these interveners pray that the court review the said Third and Fourth Supplemental Reports and Orders of the Commission and the modified plan of reorganization of the debtor therein approved; that it find that the said modified plan of reorganization was approved without legal authority and contrary to law; that the court find that the said reports and orders were entered and the said modified plan of reorganization was approved without material evidence to support it and in violation of legal standards; and that the court find that the said modified plan of reorganization will be incompatible with the public interest. And for all of the foregoing reasons, these interveners pray that the court disapprove the said modified plan of reorganization.

SOUTHERN RAILWAY COMPANY,

THE ALABAMA GREAT SOUTHERN RAILROAD COMPANY,

THE CINCINNATI, NEW ORLEANS AND TEXAS PACIFIC RAILWAY COMPANY,

GEORGIA SOUTHERN AND FLORIDA RAILWAY COMPANY,

NEW ORLEANS AND NORTHEASTERN RAILROAD COMPANY,
ST. JOHNS RIVER TERMINAL COMPANY,

Interveners.

(Sgd) SIDNEY S. ALDERMAN,
Sidney S. Alderman,
Southern Railway Building,
15th and K Streets, N.W.,
P. O. Box 1808,
Washington 13, D. C.

(Sgd) HENRY L. WALKER,
Henry L. Walker,
Southern Railway Building,
15th and K Streets, N.W.,
P. O. Box 1808,
Washington 13, D. C.

(Sgd) CHARLES CLARK,
Charles Clark,
Southern Railway Building,
15th and K Streets, N.W.,
P. O. Box 1808,
Washington 13, D. C.

Attorneys for Interveners.

Of Counsel:

CYRIL C. COPP,
1625 Barnett National Bank Bldg.,
P. O. Box 537,
Jacksonville 1, Florida.

Protest of Railway Labor Executives' Association, Intervenor.

UNITED STATES DISTRICT COURT,

TO THE SOUTH DISTRICT OF FLORIDA,

JACKSONVILLE DIVISION.

IN THE MATTER *of* FLORIDA EAST COAST RAILWAY COMPANY.	No. 4827-J. Bankruptcy.

Now comes the Railway Labor Executives' Association and files this its protest against the plan of reorganization of the debtor which said plan has been heretofore approved by the Interstate Commerce Commission and has been submitted to this court for approval or disapproval for the reason that the said plan is unfair and inequitable and is contrary to the public interest and contrary to law.

More specifically, this intervenor says:

FIRST GROUND OF PROTEST.

This plan of reorganization contemplates a forced merger or consolidation of the corporate identities, properties and operations of two carrier corporations without the consent of one of the said corporations or of anyone legally empowered to act for it contrary to the intent and purpose of Section 5 (2) of the Interstate Commerce Act, and of Section 77 of the Bankruptcy Act. Properly interpreted, Section 77 of the Bankruptcy Act contemplates no extension of the powers of the Interstate Commerce Commission in connection with mergers or consolidations of carriers over

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and above those provided in Section 5 (2) of the Interstate Commerce Act. Section 5 (2) of the Interstate Commerce Act confers no authority upon the Interstate Commerce Commission or any other agency or tribunal, administrative or judicial, to compel any consolidation or merger of carriers, their properties, operations or corporate identities without the consent of both. Hence, this intervenor says that the order of the Interstate Commerce Commission and the plan of reorganization approved in such order are alike contrary to law.

SECOND GROUND OF PROTEST.

Under the uncontroverted evidence presented at the hearings conducted by and before the Interstate Commerce Commission and according to the findings of the Commission in its third supplemental report, issued on April 8, 1947 (sheets 29-31), the plan of reorganization contemplating merger of the properties and operations of the debtor with those of the Atlantic Coast Line Railroad Company can be accomplished only at the expense of the dismissal from railroad service of a large number of the debtor's employees or the removal of such employees to distant points on the Atlantic Coast Line System, as the price of retention of employment by them.

The employees of the debtor who will be affected by the plan, if and when consummated, have acquired rights of seniority, under effective contracts with the debtor, which are valuable rights, entitling them to a continuing service relationship and progressively improved conditions of employment in ratio of the duration of their various individual periods of employment with the debtor.

The said employees have, by their service with the debtor, acquired service records and periods creditable toward future retirement annuities under the terms of the Railway Retirement Act. The benefits of such annuities

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will be materially lessened in the event that the said employees are forced to leave railroad service as a result of the consummation of the proposed consolidation.

The Atlantic Coast Line Railroad Company has proposed and the Interstate Commerce Commission has indicated that it will require for the protection of employees adversely affected "the same conditions as were stated in C & N W Ry. Co. Merger, 261 Interstate Commerce Commission 672." The conditions referred to read as follows:

> "During the period of 4 years from the effective date of our order herein such transaction will not result in employees of the carrier or carriers by railroad affected by such order being in a worse position with respect to their employment, except that the protection afforded to any employee pursuant to this section shall not be required to continue for a longer period, following the effective date of such order, than the period during which such employee was in the employ of such carrier or carriers prior to the effective date of such order."

The intervenor refers the court to the phrase "effective date of such order" as used by the Interstate Commerce Commission in the *C & N W Case* and adopted by reference in its report in this case and further refers to the fact that the effective date of the order of the Commission in this case is left to the discretion of the reorganization manager and is to be fixed at a time not more than six months prior to the date of consummation of the transaction. Thus, it appears that the only consideration given to the situation of the employees of the debtor by the plan of reorganization and the Commission's order of approval of such plan, is the imposition of a measure of protection limited to a period of from three and a half to four years after the consummation of the plan if finally approved by this court.

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In many individual instances the intervenor believes and alleges that this will amount to little or no protection inasmuch as many employees will not be individually affected until some time after the consummation of the plan.

The protective conditions proposed by the Interstate Commerce Commission will not in any event be effective to preserve to the employees of the debtor credit for seniority accumulated in the service of the debtor or to apply such credit toward any service relationship which the said employee may enter into with the Atlantic Coast Line Railroad Company. If the proposed consolidation is approved by this court and consummated, all matters relating to seniority rights of employees will be determined through collective bargaining between the Atlantic Coast Line Railroad Company and its employees of whom the former employees of the debtor would be a small minority and unable to take independent action to protect their seniority accumulated in the service of the debtor. Neither would the proposed conditions be effective to protect employees in relation to any rights to annuities under the Railway Retirement Act.

The damaging effects upon employees of the plan of the reorganization submitted by the Interstate Commerce Commission as to which the employees would be uncompensated, are wholly unnecessary and are not required by any need for operating economy or operating change inherent in the situation of the debtor. Reorganization of the debtor as an independent carrier on a sound financial and operating basis is wholly feasible. Such reorganization has been proposed and is being actively advocated by responsible financial interests capable of carrying it out and insuring its success. Refusal by the Interstate Commerce Commission to approve a plan for such independent reorganization is therefore unfair and inequitable as to the employees of the debtor, and is otherwise not required by the public interest.

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THIRD GROUND OF PROTEST.

As to the third ground of protest against the plan of reorganization, the intervenor adopts all of the allegations and statements set forth under its second ground of protest and says further that Section 5 (2) (c) of the Interstate Commerce Act, which establishes the factors required to be weighed before any railroad consolidation can be authorized, provides that consideration shall be given to "the interest of the carrier employees affected." The action of the Interstate Commerce Commission approving the plan of reorganization here involved does not conform to this provision of the statute in that although the employees' interests were discussed in the report of the Commission, no substantial weight was given to them as an influence upon the decision reached contrary to the provision and intent of the Interstate Commerce Act.

WHEREFORE the intervenor prays that the court enter an order finding that the plan of reorganization submitted by the Interstate Commerce Commission is neither fair nor equitable, that it is not in the public interest and that it is contrary to law, and further prays that the court disapprove the said plan of reorganization.

RAILWAY LABOR EXECUTIVES' ASSOCIATION

By

CLARENCE M. MULHOLLAND
741 Nicholas Building,
Toledo 4, Ohio.

Of Counsel:

MULHOLLAND, ROBIE & MCEWEN
741 Nicholas Building,
Toledo 4, Ohio.

Petition for Intervention of F. K. Conn as Party to the Proceedings.

THE DISTRICT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF FLORIDA.

In proceedings for the Reorganization of a Railroad.

IN THE MATTER
of
FLORIDA EAST COAST RAILWAY COMPANY,
Debtor.

No. 4827-J.

To the Honorable Judges of the above styled Court, or any of them:

Your petitioner F. K. CONN respectfully requests of the Court that he be permitted to intervene as a party to the proceedings before the Court in the above cause, and shows unto the Court:

1. Your petitioner, F. K. Conn, is the owner and holder of First and Refunding Bonds of the Florida East Coast Railway Company, the debtor herein, in the face amount of $387,500; and he is attorney in fact under valid powers of attorney to represent them in these proceedings for the following owners and holders of such First and Refunding Mortgage 5% Bonds of the debtor, owning and holding the face amounts of such bonds set opposite their names—

Edith F. Conn	$211,000.00
Holtsinger Motor Co.	40,000.00
Christine L. Holtsinger	14.000.00

Sherman B. Forbes & Helen M. Forbes	300,000.00
Everett E. Hennie	32,000.00
A. R. Beyer	11,000.00
Wm. C. Blake	9,000.00
Nell V. Clark	4,000.00

being in the aggregate a representation of $1,008,500.00 of the face amount of such bonds; and as such is a creditor entitled to be heard and to intervene under §77 (c) (13) of the Bankruptcy Act.

2. Individual bondholders and groups of individual bondholders are presently parties to these proceedings; but as their positions have been expressed before this Court in the cause and before the Interstate Commerce Commission, none of them have presented, nor is it likely that they will present, the viewpoint of this group of independent minority bondholders. Any order or judgment entered by this court will be binding upon them.

3. Neither permission to be heard as the occasion requires nor intervention for special purposes will provide your petitioner with the constant contact with the cause necessary to the complete protection of the interests which he represents, and to the ultimate best interests of the proceeding; and intervention as a party will provide your petitioner with the best opportunity to serve the interests which he represents, and permit the protection of those interests to the fullest extent, without interference with the orderly processes of this Court.

4. Your petitioner was permitted and did intervene in the proceedings heretofore had before the Interstate Commerce Commission, testified therein, filed briefs and participated in the oral arguments before the Commission.

5. While because of the nature of this proceeding, no formal defenses are pleaded by the parties, your petitioner is informed and believes that a number of the present parties hereto will oppose the plan of reorganization of said Florida East Coast Railway Company submitted by the Interstate Commerce Commission, and will pray its disapproval by the Court. Petitioner will likewise oppose approval of such plan of reorganization as more fully appears from its motion tendered to the Court herewith. The motion tendered presents issues both of law and of fact.

WHEREFORE your petitioner prays the Court that an order be entered granting leave of this petitioner to intervene generally in this proceeding and to become a general party thereto.

(s) HOWARD P. MACFARLANE,
Attorney for Petitioner F. K. Conn,
Address: 215 Madison Street
(P. O. Box 1531)
Tampa, Florida

Of Counsel—

MACFARLANE, FERGUSON, ALLISON, & KELLY

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Petition to Set Aside and Annul the Third Supplemental Order of the Interstate Commerce Commission Filed in this Cause.

THE DISTRICT COURT OF THE UNITED STATES,

FOR THE SOUTHERN DISTRICT OF FLORIDA.

In proceedings for the Reorganization of a Railroad.

IN THE MATTER *of* FLORIDA EAST COAST RAILWAY COMPANY, Debtor.	No. 4827-J.

Comes now, F. K. CONN, an interested party to these proceedings, on behalf of himself and others similarly interested from whom he holds powers of attorney as set forth in his petition for intervention filed herewith, and petitions the Court to set aside and annul the Third Supplemental Order of the Interstate Commerce Commission filed herein pursuant to its third and fourth supplementary reports, and referred to by the Commission as the Florida East Coast Railway Reorganization, Finance Docket 13170, and in support of his petition to this Court, said F. K. Conn says:

1) that all parties affected by that order are before this Court or subject to its jurisdiction with reference to the subject matter of the order complained of.

2) that your petitioner, F. K. Conn, holds and owns First and Refunding Bonds of the debtor company and

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holds powers of attorney for other holders and owners of such bonds as set forth in his petition of intervention filed herewith, and that said holders and owners are creditors whose rights are substantially affected by the aforesaid order; and that he has by another petition filed at this time requested the Court that he be permitted for himself and for those others similarly interested to intervene as a general party in these proceedings.

3) that this Court is required by the Bankruptcy Act (77 (e)), to approve the plan submitted by the order complained of if it complies with certain prerequisites therein set out so that this Court is not, except by special petition, as is herein made, permitted to question the validity of the order before its approval, and consequently there is not, under the usual processes available to this court in proceedings for the reorganization of a railroad, any adequate remedy under the law, either prior or subsequent, for the setting aside or annuling of an order which is illegal, but nevertheless contains the formal requirements for judicial approval under the Bankruptcy Act.

4) this extraordinary petition is brought before the Court under the authority of Section 77 of the Bankruptcy Act (11 USCA § 205), Section 207 et seq. of the Judicial Code (28 USCA §§ 46 et seq.) and Section 10 of the Administrative Procedure Act (5 USCA 1001-1011, 1009).

5) this petitioner has exhausted his administrative remedies, having filed as of July 19, 1947 his petition before the Interstate Commerce Commission for reconsideration and modification of the order complained of.

6) the grounds on which it is requested that the action of the Interstate Commerce Commission be set aside are:

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A. That the order of the Interstate Commerce Commission is arbitrary, capricious, an abuse of discretion, and not in accordance with law in that it requires the transfer of all properties of the debtor Florida East Coast Railway Company to the Atlantic Coast Line Railroad Company (Third Supplemental Order, p. 1, Paragraph II), a stranger to the proceedings, without the safeguard of a public sale; and further, without any determination that the Atlantic Coast Line shall pay any fixed or presently determinable amount or value for such properties, payment being ordered in terms of stated or par value or face value of securities likely to fluctuate widely in market value prior to the consummation date (Third Supplemental Order, p. 3, Paragraph IX; p. 10, Paragraph XIV);

B. That the order of the Interstate Commerce Commission is contrary to constitutional right, power, privilege or immunity, principally in that it violates the Fifth Amendment to the Constitution of the United States by taking the property of the First and Refunding Mortgage bondholders of the debtor, including petitioner, (1) without due process of law, in that the taking is for the private purpose of presenting such property to the Atlantic Coast Line Railroad Company, a private corporation, and (2) by a forced sale and without just compensation, if for any public purpose;

C. That the order of the Interstate Commerce Commission is in excess of statutory jurisdiction, authority, or limitations, or short of statutory right, in that it has attempted to apply, in order to justify its order, a standard of "public interest" appropriate only to proceedings under the Interstate Commerce Act, Section 5 (2); and inappropriate to proceedings under the Bankruptcy Act (Third Supplemental Report of the Commission, sheets 14, 15, & 16) where different parties

are required to be heard, different procedures are required to be followed, different results are desired, and different basic legal principles are applied;

D. That the order of the Interstate Commerce Commission is without observance to procedure required by law, in that it has attempted to formulate a plan which it knows in advance would not be approved by the only interest required to vote, namely, the First and Refunding bondholders, (Third Supplemental Report, sheet 13), and has therefore sought to prejudge the Court's attitude toward the plan to the prejudice of hearings required to be before this Court;

E. That the order of the Interstate Commerce Commission is unsupported by substantial evidence in that:

(1) it is not proper for the Commission to determine that the proponent of a plan is a party in interest in order to merely develop evidence on an issue in the cause (Third Supplemental Report, sheet 7); and consequently it was improper to find that the Coast Line was a party in interest and that the plan which it filed was properly before the Commission (Third Supplemental Report, Summary of Findings, No. 1).

(2) the record is not sufficient for a determination of the issue of "public interest" (Third Supplemental Report, Summary of Findings, No. 2) because the record shows that the Commission relied principally on alleged evidence concerning operating control, largely ignoring evidence of public interest involved in the financing of this debtor and of railroad securities generally, which was the only evidence properly before the Commission on the issue of "public interest."

(3) there is no evidence to support the necessity of a private sale negotiated by the Commission (Third Supplemental Report, Summary of Findings, No. 3).

(4) if there was any actual evidence of resulting savings from the unifications of the operations of the debtor and the Coast Line, then that should be reflected in an increased value of the debtor properties, which the Commission refuses to find (Third Supplemental Report, sheets 58-60).

(5) the Commission has relied on suspicion, surmise, implications, matter never introduced as evidence and has considered facts and circumstances which ought not legally to influence its conclusions.

7) That the injury to your petitioner herein is immediate, direct and continuing, in that the improper and illegal order of the Commission has decreased the value of the bonds of the debtor which he holds, and he cannot now receive their true value by sale, nor can he so long as such order is allowed to stand, nor if it is replaced by some modified or substitute order based on the same illegal foundations.

WHEREFORE, the said F. C. Conn respectfully petitions the Court that it hold hearings on the above and foregoing matters, reviewing the record and hearing such evidence as may be required for a determination of the matter before this Court, and that if the Court finds that on any ground there is support for this motion, to forthwith set aside and annul the above described order of the Interstate Commerce Commission and require the Commission to proceed

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according to law in the formation of a plan of reorganization to be presented to this Court.

(s) HOWARD P. MACFARLANE,
Howard P. Macfarlane,
Attorney for F. K. Conn,
Address,
215 Madison Street,
(P. O. Box 1531),
Tampa, Florida

Of Counsel
MACFARLANE, FERGUSON, ALLISON & KELLY

Petition for Intervention of President and Directors of the Manhattan Company and J. Bryson Aird; as Successor Trustees under Florida East Coast Railway Company First and Refunding Mortgage dated September 1, 1924.

IN THE
DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF FLORIDA

IN THE MATTER *of* FLORIDA EAST COAST RAILWAY COMPANY, Debtor.	No. 4827-J. In Proceedings for the Reorganization of a Railroad.

To the Honorable Judges of the District Court of the United States for the Southern District of Florida:

The petition of President and Directors of the Manhattan Company and J. Bryson Aird, Successor Trustees under the First and Refunding Mortgage dated September 1,

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1924 (hereinafter called the Mortgage), of Florida East Coast Railway Company, respectfully shows:

1. President and Directors of the Manhattan Company is a trust and banking corporation organized and existing under the laws of the State of New York, having its principal place of business at 40 Wall Street, New York 15, New York, in good standing and having a capital and surplus aggregating at least $2,000,000; and such corporation is, and at all of the times in respect of which it is hereinafter mentioned was, duly authorized and empowered to hold in trust the property conveyed, transferred and assigned by the Mortgage upon the trusts therein stated and to execute and perform the trusts imposed upon the Corporate Trustee under and by virtue of the Mortgage.

2. J. Bryson Aird is a citizen of the State of New York, residing in the City, County and State of New York.

3. On information and belief on or about May 14, 1948, Bankers Trust Company and R. G. Page, the then duly qualified and acting trustees under the Mortgage, were removed by the holders of three-quarters in principal amount of the bonds secured thereunder and then outstanding, in accordance with the provisions of Article Twelve, Section 2 thereof.

4. On information and belief, on or about May 14, 1948 Chemical Bank and Trust Company and Howard B. Smith were duly appointed Corporate Trustee and Individual Trustee respectively under the Mortgage by the holders of a majority in principal amount of the bonds secured thereunder and then outstanding, in accordance with the provisions of Article Twelve, Section 3 thereof.

5. On information and belief, on December 8, 1948 Chemical Bank and Trust Company and Howard B. Smith, the duly qualified and acting trustees, had expressed their desire to resign and had taken the required steps to make such resignation effective, in accordance with the provisions of Section 2 of Article Twelve of the Mortgage.

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6. Section 3 of Article Twelve of the Mortgage provides in substance and in part that if at any time the Corporate Trustee thereunder shall resign, a successor may be appointed by the holders of a majority in principal amount of the bonds thereby secured and then outstanding by an instrument or concurrent instruments signed by such bondholders or their attorneys in fact duly authorized. Petitioners are informed and believe, and therefore allege, that on or about November 23, 1948, the only bonds issued and outstanding under the Mortgage were $45,000,000, principal amount, of Florida East Coast Railway Company First and Refunding Mortgage 5% Gold Bonds, Series A, due 1974 (hereinafter called the Mortgage Bonds), and that on or about November 23, 1948, the St. Joe Paper Company, a corporation organized and existing under the laws of the State of Florida, was the holder of $23,259,000, principal amount of the Mortgage Bonds, such principal amount of bonds being in excess of a majority in principal amount of the bonds secured by the Mortgage and outstanding on that date.

7. On or about November 23, 1948, the aforesaid St. Joe Paper Company, as majority bondholder, and by signed instrument, duly appointed President and Directors of the Manhattan Company as Corporate Trustee under the Mortgage in succession to said Chemical Bank and Trust Company.

8. By instrument dated as of December 8, 1948, delivered to the Debtor, your petitioner, President and Directors of the Manhattan Company, accepted the appointment as Successor Corporate Trustee under the Mortgage.

9. Section 3 of Article Twelve of the Mortgage further provides in substance and in part that in case at any time the Individual Trustee shall resign or otherwise become incapable of acting, except as a result of his removal from office, a successor to such Individual Trustee may be ap-

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pointed by the Corporate Trustee by an instrument in writing.

10. On or about December 9, 1948, President and Directors of the Manhattan Company, as the authorized and acting Corporate Trustee, and by instrument in writing, duly appointed J. Bryson Aird, as Individual Trustee under the Mortgage in succession to said Howard B. Smith.

11. By instrument dated as of December 9, 1948, delivered to the Debtor and to President and Directors of the Manhattan Company as co-trustee, J. Bryson Aird accepted the appointment as Successor Individual Trustee under the Mortgage.

12. Since their appointment as aforesaid, your petitioners have at all times acted and are still acting as Successor Trustees under the Mortgage.

13. The interests of the holders of the Mortgage Bonds are or may be seriously affected by the proceedings to be had herein, and particularly by any plan of reorganization of the Debtor which may be submitted for confirmation by this Court in this proceeding, and petitioners are advised and believe that, as Successor Trustees under the Mortgage, it is their duty to the holders of the Mortgage Bonds to intervene herein for the protection of such holders.

14. Paragraph (13) of subsection (c) of Section 77 of the Act of Congress entitled "An act to Establish a Uniform System of Bankruptcy throughout the United States", approved July 1, 1898, and the acts amendatory thereof and supplemental thereto, provides, among other things, that, after approval of a petition filed under said Section 77, the trustee or trustees of any mortgage, deed of trust or indenture pursuant to which securities of the debtor are outstanding, may be permitted to intervene upon petition therefor and cause shown.

WHEREFORE, petitioners pray leave as such Successor Trustees to intervene generally in this proceeding as gen-

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eral parties thereto and that notices of motions and proceedings herein be required to be served upon their attorneys and that petitioners be granted such other and further relief which they may hereafter apply for as may be necessary or proper in the premises.

Dated December 13th, 1948.

PRESIDENT AND DIRECTORS OF THE MANHATTAN COMPANY,

By LESLIE COLEMAN
Vice-President

J. BRYSON AIRD
J. Bryson Aird
As Successor Trustees under the First and Refunding Mortgage dated September 1, 1924 of Florida East Coast Railway Company.

(CORPORATE SEAL)

Attest:

G. C. PABST
Assistant Secretary.

APPLETON, RICE & PERRIN,
63 Wall Street,
New York 5, N. Y.
Attorneys for President and Directors of the Manhattan Company and J. Bryson Aird, as Successor Trustees under the First and Refunding Mortgage dated September 1, 1924, of Florida East Coast Railway Company.

CLIFTON S. THOMSON,
of Counsel.

CHESTER BEDELL,
315 Guaranty Life Bldg.,
Jacksonville, Florida,
of Counsel.

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Transcript of Proceedings.

IN THE

UNITED STATES DISTRICT COURT,

IN AND FOR THE SOUTHERN DISTRICT OF FLORIDA,

JACKSONVILLE DIVISION.

In Bankruptcy.

In Proceedings for the Reorganization of a Railroad.

IN THE MATTER *of* FLORIDA EAST COAST RAILWAY COMPANY, Debtor.	No. 4827-J.

Upon hearing in the above cause, on the fairness of the Plan of Reorganization, before His Honor, Samuel H. Sibley, U. S. District Judge Designate, commencing at 10:00 o'clock a. m., Monday, January 10, 1949.

Appearances:

Hon. SCOTT M. LOFTIN and Hon. JOHN W. MARTIN, Trustees of the property of the Florida East Coast Railway Company.

RUSSELL L. FRINK, Esquire, appearing on behalf of the Trustees.

JOHN B. L'ENGLE, Esquire, appearing on behalf of the Florida East Coast Railway Company.

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GILES J. PATTERSON, Esquire, JAMES F. BYRNES, Esquire, and DONALD RUSSELL, Esquire, appearing on behalf of St. Joe Paper Company.

ROBERT R. MILAM, Esquire, of the law firm of Milam, McIlvaine, Carroll & Wattles, Jacksonville, Florida; WILLARD P. SCOTT, Esquire, of the law firm of Oliver & Donnally, New York City, New York, appearing on behalf of the S. A. Lynch Interests.

MILLER WALTON, Esquire, of the law firm of Walton, Hubbard, Schroeder, Lantaff & Atkins, Miami, Florida, appearing on behalf of W. G. Welbon, et al.

HOWARD P. MACFARLANE, Esquire, of the law firm of Macfarlane, Ferguson, Allison & Kelly, Tampa, Florida, appearing on behalf of F. K. Conn, et al.

H. P. OSBORNE, Esquire, of the law firm of Osborne, Copp & Markham, Jacksonville, Florida, and PAUL B. BARRINGER, JR., Esquire, of the law firm of Jackson, Nash, Brophy, Barringer & Brooks, New York City, N. Y., appearing on behalf of Guaranty Trust Company of New York and Arthur E. Burke, First Mortgage Trustees.

CLIFTON S. THOMSON, Esquire, of the law firm of Appleton, Rice & Perrin, and CHESTER BEDELL, Esquire, of the law firm of Bedell & Bedell, appearing on behalf of Bank of the Manhattan Company, Trustee for the First & Refunding Bonds.

EDWARD W. BOURNE, Esquire, of the law firm of Alexander & Green, New York City, N. Y.; RICHARD B. GWATHMEY, Esquire, General Attorney, Atlantic Coast Line Railroad Company, Wilmington, North Carolina; CHARLES COOK HOWELL, Esquire, General Counsel, Atlantic Coast Line Railroad Company, Wilmington, North Carolina;

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LeRoy B. Giles, Esquire, Orlando, Florida, and G. L. Reeves, Esquire, of the law firm of Reeves, Allen & Johnson, Tampa, Florida, appearing on behalf of the Atlantic Coast Line Railroad Company, Intervenor.

Sidney S. Alderman, Esquire, General Counsel, Southern Railway Company, Washington, D. C.

Henry L. Walker, Esquire, Law Department, Southern Railway Company, Washington, D. C.

Robert N. Lowry, Esquire, Law Department, Southern Railway Company, Washington, D. C.

C. C. Copp, Esquire, of the law firm of Osborne, Copp & Markham, Jacksonville, Florida, appearing for the Southern Railway Company, Intervenor.

Walter H. Brown, Jr., Esquire, of the law firm of Willkie, Owen, Farr, Gallagher & Walton, New York City, N. Y., and Guy W. Botts, Esquire, of the law firm of Fleming, Jones, Scott & Botts, Jacksonville, Florida, appearing on behalf of the Seaboard Air Line Railroad Company, Intervenor.

Herman Ulmer, Esquire, and H. I. Cone, Esq., of the law firm of Stockton, Ulmer & Murchison, Jacksonville, Florida, and, Edgar G. Crossman, Esquire, of the law firm of Davis, Polk, Wardwell, Sunderland, & Kiendl, New York City, N. Y., appearing on behalf of the Deposit Committee of the First & Refunding Bonds.

Francis T. P. Plimpton, Esquire, of the law firm of Debevoise, Plimpton & McLean, New York City, N. Y. and William H. Rogers, Esquire, of the law firm of Rogers, Towers & Bailey, Jacksonville, Florida, appearing on behalf of the New York Trust Company, Trustee for Florida East Coast Railway Equipment Trust Series "D".

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EDWIN C. COFFEE, JR., Esquire, of the law firm of Coffee & Coffee, Jacksonville, Florida, and EDWARD J. HICKEY, JR., Esquire, of the law firm of Mulholland, Robie, McEwen & Hickey, Washington, D. C., appearing on behalf of the Railway Labor Executives Association.

Reporter, V. F. HALTER.

The Court: I suppose you gentlemen know that the Chief Judge of this Circuit has sent me down here to pinch hit for Judge Strum, and I think I might say a few words in the beginning.

I have never had much experience about railroad reorganizations. I know, of course, very little about this case. I do not want you, however, to waste time on it, and I am going to tell you in advance what I have done by way of preparation.

I have, of course, read, very carefully, Section 77 of the Bankruptcy Act, and I have read the two cases in 218, United States, about it. One, the Denver & Rio Grande, in 228, and 229, US, and that is the background of the law.

So far as the case, itself, is concerned, I have had the clerk send me reports of the Interstate Commerce Commission to bring me on down to date, and, the objections made to it. So, I have some familiarity with the issue. I am not saying the reports seem to be confusing to some extent, and I may have gotten a little mixed up in my mind about various plans, and I may need straightening out on those things, but, in a general way, I know what the case is about, and I know what we have got to decide, and I know a little something about the law behind it, and I will do the best I can to get along as fast as we can.

The Order that brings the Court together, and brings you here, has a number of items on it. I ordinarily let the

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plaintiff run his case, but I do not know who the plaintiff is here. There are so many people here, so, I guess I will have to run it.

I read, here, that there is to be heard, a number of matters. Of course, the main matter is the Plan certified by the Interstate Commerce Commission; whether it should be approved or not.

And, another matter that I would like to deal with separately, and, it is a good reason for not doing it, is the disposition of cash on hand in retiring the First Mortgage Bonds. It seems to me, off-hand, that ought to be done at once. It is in line with the Plan, and, if the Plan is approved, or, disapproved preliminary to another Plan, looking at it down one side and up the other, it seems it ought to be dealt with and heard at once.

And, the question of whether there are any free assets or not. The Commission said there were not, in their opinion, and the Judge should hear the issue, at least, and I think that is true. If there are any free assets let us know it, and if not, let us know it and get that straightened out.

We finally get down to the plan, itself, and possibly get down to the other items, which are of interest, too.

That is the schedule I would like to follow unless there are good reasons to the contrary. There are preliminaries to begin with. Services. Does the record show that the order of service has been sent out? Is there anybody here for the Trustees?

Mr. Thomson: Which Trustee?

The Court: Trustees of the Reorganization.

Mr. Thomson: As a very preliminary matter, I have a Petition to Intervene——

The Court: I want to see about that, first. Have the services been made that were specifically ordered by the Court?

The Clerk: Judge, that would be Mr. Frink.

The Court: Will you tell me about that, Mr. Frink.

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Mr. Frink: These gentlemen have filed petitions, and have offered no dissent, and we agree that they were performed upon behalf of the Trustees.

The Court: The Order required that public service, and notice of service to counsel, where there were counsel. The publications have been made?

Mr. Frink: Yes, sir.

The Court: To the Bondholders and people interested generally?

Mr. Frink: Yes, sir, and the report has been filed.

The Court: Does anybody think there is any need to go into that further? I would hate to have the hearing go up in smoke because somebody was not served.

. . . To which inquiry there was no response.

The Court: I guess we can take it that the service is all right.

Mr. Frink: We would be glad to have you examine the service of the Trustees on all parties. It is in the record.

The Court: I am taking your word for it.

Mr. Frink: We think it is all right.

The Court: You are satisfied? You think the order has been carried out?

Mr. Frink: Yes, sir.

The Court: The parties in court, represented by counsel, I would like to know who they are. Those that are already in court. Then, I will come to the intervention next.

Mr. Howell: If your Honor please, for the Atlantic Coast Line Railroad Company, Edward W. Bourne, Esquire, Richard B. Gwathmey, Esquire, Charles Cook Howell, and LeRoy B. Giles, Esquire.

Mr. Patterson: On behalf of the St. Joe Paper Company, Honorable James F. Byrnes, and myself, Giles J. Patterson, appearing as counsel.

Mr. Alderman: On behalf of the Southern Railway Company and its System and affiliated lines, Sidney S. Alderman, Henry L. Walker, Robert N. Lowrey and local

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counsel, C. C. Copp, enter their appearances. I am Sidney S. Alderman.

Mr. Milam: If your Honor please, on behalf of the S. A. Lynch & Associates, Willard P. Scott and Robert R. Milam.

Mr. Ulmer: On behalf of the Deposit Committee of First & Refunding Bonds, Edgar G. Crossman, New York City, H. I. Cone and Herman Ulmer.

The Court: That is the First & Refunding Bonds Committee?

Mr. Ulmer: Yes, sir.

The Court: Did you say "Trustees", or "Committee"?

Mr. Ulmer. "Committee".

Mr. Osborne: On behalf of Guaranty Trust Company of New York and Arthur E. Burke, Trustees for the First Mortgage Bonds, Mr. Paul B. Barringer, Junior, of New York City, and H. P. Osborne.

Mr. Botts: For the Intervenor, Seaboard Air Line Railroad Company, Walter H. Brown, Junior, of New York, and G. W. Botts.

Mr. Rogers: On behalf of New York Trust Company, Petitioners, with reference to free assets, Mr. Francis T. P. Plimpton, of New York, and myself, William H. Rogers.

The Court: Are there any others?

Mr. Macfarlane: May it please your Honor, on behalf of F. K. Conn & Associates, Howard T. Macfarlane.

Mr. Walton: May it please your Honor, on behalf of W. G. Welbon and other minority bondholders of the First & Refunding Bonds, Miller Walton.

The Court: Well, if those are all who are presently represented, what about the other intervenors now?

Mr. Thomson: If your Honor please, I represent The Bank of the Manhattan Company, which has been substituted as the Trustee for the First & Refunding Mortgage 5's. That happened last December. In other words, I made an application to intervene——

The Court: What has become of the old Trustee?

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Mr. Thomson: They resigned. The Chemical Bank & Trust Company.

The Court: Are you adopting their pleadings and position?

Mr. Thomson: And we are adopting their pleadings and position.

The Court: You just want the right to be allowed to intervene, is that all?

Mr. Thomson: That is right.

The Court: Are there any others?

Mr. Frink: If the Court please, do you desire to recite the presence of the two Trustees and their counsel, and also Mr. John B. L'Engle, representing the Florida East Coast Railway Company?

The Court: Yes. Who represents them?

Mr. Frink: Russell L. Frink, appearing on behalf of the Trustees, and Mr. John B. L'Engle, appearing on behalf of the Florida East Coast Railway Company.

The Court: This order was written as though it was to be signed by the Chief Judge.

Mr. Thomson: No, your Honor. If you will just scratch it out.

The Court: No, I will put it "Judge Designate", because I have been designated as a District Judge.

The Court: Now, the next intervener, please.

Mr. Patterson: If your Honor please, may I make an amendment? I omitted to note the name of Mr. Donald Russell, also as counsel for St. Joe Paper Company.

Mr. Macfarlane: If your Honor please, there has been pending for a few months, a petition for intervention of a party in these proceedings, on behalf of F. K. Conn, on behalf of himself and others who hold a substantial amount of First & Refunding Bonds. Due notice of that petition has been given and it has never been passed on.

The Court: Well, there are objections from Mr. Conn. You say this is something else?

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Mr. Macfarlane: This is a petition to allow him to intervene as a party in the cause.

The Court: What does he want to do? I guess he has a reason.

Mr. Macfarlane: I would like to have the petition allowed, if there is no objection, and, so far as I know, there has been no objection.

The Court: He holds some of these First and Refunding Bonds?

Mr. Macfarlane: Yes.

The Court: And he wishes to become a party?

Mr. Macfarlane: He wants to be a party in the cause.

The Court: That is what it amounts to.

Mr. Macfarlane: Yes.

The Court: Is there any objection?

. . . To which inquiry there was no response.

The Court: Well, let it be allowed.

Mr. Bourne: I take it by not objecting to the intervention, we do not waive or admit all of the allegations of the Petition?

The Court: No, there is nothing admitted unless you come to an answer.

Mr. Bourne: We do not want to object to the Petition, but we do want to reserve certain rights.

Mr. Coffee: On behalf of the Railroad Labor Executives Association, Edwin C. Coffee, Jr., of the local bar, and Edward J. Hickey of the bar of the District of Columbia.

The Court: They are Petitioners that wish to intervene?

Mr. Hickey: That is right. The Railway Labor Executives Association seeks to intervene on behalf of certain employees of the Florida East Coast Railway Company whose interests will be materially and adversely affected if the plan now before the Court is consummated.

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We filed this Petition before this Court on June 22nd, and filed with it, an objection, in accordance with the Court's order on the same date.

As far as I know, there have been no objections to the intervention. We fully participated in the Commission proceedings. We were allowed to intervene and filed briefs and participated in oral arguments there.

The Court: Maybe I need a little information about that. An intervention allowed by the Commission does not make you a party in court, is that it?

Mr. Hickey: Not necessarily, your Honor.

The Court: For instance, if you wanted to appeal from the decision of the Court, you think you would have to be an intervenor to be entitled to appeal?

Mr. Hickey: That is why we sought our intervention.

The Court: Is there any objection to the intervention?

. . . To which inquiry there was no response.

The Court: Let them be permitted to intervene.

The Court: Now, is there anything else?

. . . To which inquiry there was no response.

The Court: Well, the battle lines are drawn, gentlemen.

Mr. Plimpton: Your Honor, I wonder if I could make a comment or a little observation as to the order in which these factual matters are to be taken up. I represent the New York Trust Company, as Trustees of the Series "D" Equipment Trust, Florida East Coast Railway Company, and interested in the problem of whether or not there are free assets, which is one of the matters your Honor mentioned.

We have brought, if your Honor please, a petition in this proceedings for a separate determination of that issue. Testimony has been taken before a Special Master, to take testimony. The testimony is not quite complete. It will be completed as soon as this hearing is over and as soon as the

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staff of the railway have had time to recuperate from their labors in connection with this hearing. So that if your Honor please, it seems to me that that is somewhat of a separate issue to be considered by the Court ——.

The Court: Well, it is. That is what I said, it would be a separate issue.

Mr. Plimpton: Yes, sir. To be determined, if your Honor please, as soon as the testimony is completed.

The Court: Yes, but, this is the date it was set for hearing, a long time ago. We will go as far as we can with it, now, and if there is any reason to take further evidence, we can do it.

Mr. Plimpton: The testimony is almost complete, and I would not think it would be more than a day or two.

The Court: Is there any reason it has not been completed before?

Mr. Plimpton: The railway company has been under a great deal of pressure for the preparation of this hearing.

The Court: What is your motion?

Mr. Plimpton: I have no motion except that I believe that your Honor will not have that particular issue discussed at the hearing this week ——.

The Court: I will refuse your suggestion. We will go along as far as we can go, and if you don't have all your evidence in, we will have to get it.

Mr. Bourne: Your Honor, I would like to suggest, if I may, that upon the frame-work of the plan, that issue can be decided separately and independently of the approval of the plan. That has been the custom in a great many railroad reorganizations.

The Court: The Commission said it did not think there were any free assets, and, if there were, they were insignificant and could be handled in the Plan itself.

Mr. Bourne: They put in the Plan, a provision of what should be done if the Court decided the other way.

Mr. Plimpton: That isn't necessary, your Honor, because the Plan says the Commission does not think there

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are any free assets. If the Court finds there are free assets, then the Plan provides that one-half bonds and one-half stock are to be awarded up to the value of the free assets.

The Court: I overlooked that detail. I do not want to have any reason to postpone a decision, but I have another job to do after I decide this case, and I want to go to it next week. I want to get through with everything that I can while I am here, and if I do not get through, I want to get as far as I can.

Mr. Plimpton: Not that I am suggesting postponement on the free assets, but, it would be proposed within the framework of any Plan, to have that discussion later.

Mr. Thomson: Speaking for the Bondholders, and I suppose the owners of the First Mortgage Bonds join in opposing Mr. Plimpton, I would not be in a position to argue that now.

The Court: You gentlemen have got to be ready. The Court set it and orders have been made, and it was known that it would be heard at this time, and, you have to be ready.

Mr. Thomson: I have only been in this a month, and I have been trying to prepare myself for the more important issue.

The Court: That may be an important issue, and it may be a doubtful issue, and it may not be any doubt about it at all. I am going into it as far as I can get. We may not be able to finish the hearing this week, and you may not be able to finish your argument, but I will continue the program. I will hear you gentlemen first, about paying off these bonds.

Mr. Milam: If your Honor please, I assume the Court has read the petition for the payment of the First Mortgage Bonds. There are gross assets on hand of twenty-five million dollars, and have been on hand for some years. The payment of that mortgage is a part of the Plan of the Interstate Commerce Commission. That the cash is sterile, and that the cash on hand has arisen out of earnings

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of the railroad. That is costing about a thousand dollars a day interest, not to pay off the bonds, and, they should be paid off.

Now, the matter came before the Commission, and the Commission, in one sentence, stated the issue, as far as we saw it. On page 589 of the Report of January 8, 1945, the Commission said:

"Whether these bonds should be retired by payment or otherwise in connection with the administration of the Debtor's Estate, appears to be a matter of the Court's discretion.

That is precisely the view that your Honor has intimated. The sensible point here, is that these bonds have not yet, according to their terms matured. They have some eight years, I believe, to run. So far as paying them off prior to the culmination, or the consummation of the Plan of Reorganization, I do not believe there can be any doubt. In a mimeographed brief, we cite many cases where that has been done by the Court, and the leading case in point on that——

The Court: Well, what position, if any, have the Mortgage Trustees taken under this? Have they answered it?

Mr. Milam: Yes, they have answered it, and while the drawing of the issue is not inevitable, I assume that they oppose it only due to the fact that interest should be paid to the date of the mortgage maturity. I think that is the position, is it not?

Mr. Barringer: We take the position that we find no authority in the Court to compel bondholders—if these bonds are not directed to be paid under this Order. It is directed that moneys be set aside and the bonds then in effect passed to the Mortgage Trustee, who will get the benefit of the First and Refunding Bonds.

The Court: These bonds that the Trustees have taken up in the past three years?

Mr. Barringer: No, sir, the order is in a way, ambiguous. It directs that in one paragraph the bonds be paid. Is an

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order to compel prepayment. Then it goes on to say that the bonds—it directs the funds shall be placed in the hands of the Trustees, and all bondholders who do not come in for their bonds, their rights will be cut off and their rights of interest ceases. It directs the bonds to be held. It is not a payment, but, to be held for the benefit of the First & Refunding Bonds who shall be subrogated to all of the rights under those bonds.

Our position is whether the Court has the right to compel the payment of the bonds now.

The Court: Well, are the bonds callable?

Mr. Barringer: No, sir, the bonds are not callable. There is no provision in the bonds under which they could be called, except for non-payment of principal or interest, which continues for six months.

The Court: You say that the Court, heretofore, has given the Trustees an order to carry out the purchase of the bonds?

Mr. Barringer: I did not mean to interrupt my friend's argument.

The Court: I asked what position you take in that mortgage. You said the order should be carried out.

Mr. Barringer: Unless a plan is promulgated and approved in accordance with Section 77.

The Court: You are not adopting, or, you are not objecting to the Plan, then?

Mr. Barringer: No, sir, we find no objection to the plan.

The Court: Well, what is the difference? If they are going to make a plan to pay them off, why do you object to paying them now? It is just a few months.

Mr. Barringer: I did not mean to interrupt—.

The Court: No, I know.

Mr. Barringer: Our only position there is that after all, these bonds are not due for seven or eight years. There was an order issued by Judge Strum back in '45, authorizing the Trustees to purchase these bonds on tender.

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The Court: He first raised the idea in this opinion, that the money was lying idle.

Mr. Barringer: Yes, sir. Personally, I would be sympathetic with such a demand. We are Trustees.

The Court: I think you are right, if this thing was not in bankruptcy, or was not in receivership, that these bonds would have to run to maturity. But, I have not been aware of the fact that when bankruptcy happens, or, receivership, and causes a reorganization, that the Court would have to wait.

Mr. Barringer: We do not say the bonds have to run to maturity at all. We recognize, under Section 77, that the Court has the power to pay these bonds off, and the powers under Section 77 are very great. Those powers, however, are incident to a plan which has been approved in accordance with that section.

The Court: Well, is that althogether incident to the Plan? The Court has also powers to make the order as a receivership court. That is the present position.

Mr. Barringer: Yes, quite so. Certainly in one case, the Comstock case, there they paid off in advance of the approval of a plan—they paid off an underlying mortgage such as ours. In that case, however, one of the mortgages was long past due and was in default.

The Court: Your mortgage has not been allowed to get in default?

Mr. Barringer: Our mortgage has not been allowed to get in default, certainly with respect to principal or interest. There have been defaults with respect to other covenants, but under the terms of the mortgage, the right of calling the mortgage, making it due and payable, only arises on a default of principal or interest, which continues for six months. Now, that has not been the case.

The Court: All right, I understand the position of the Trustees.

Mr. Milam: Then, I will state the issue as I understand it. I understand the critical point is that these bonds have

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not yet matured. So far, your Honor, as paying them off in a Section 77 proceeding prior to the consummation of the Plan of Reorganization, I think there is no doubt.

The Courts have decided in many cases along that line. In the case of Comstock versus Thompson, Judge Gardner, in calling the First & Refunding Bonds, like these, said:

"In an ordinary bankruptcy proceeding, the Trustee may, without doubt, retire mortgages and protect the equity of redemption, and we are clear that the same power is vested in the Trustee in a reorganization proceeding."

That is precisely the view expressed by the Court. It is quite true those bonds have not matured. It is likewise true that formerly, when Judge Strum was asked to prepay these bonds, he provided for the calling in, voluntarily, of those who tendered their bonds, and roughly, four million out of the eight million dollars now in the hands of the Trustee, are in that category. He did not rule it could be prepaid. He reserved that issue for a later decision.

I can state the position of the Petitioner, here, very briefly. When the matter once gets into bankruptcy, the powers of the Bankruptcy Court intervenes. The Court has, through its Trustee or Trustees, the right to require the equity of redemption by paying off prior liens at any time. Generally, in bankruptcy, that has been done. Perhaps it is not too much to say that in the Court's decision, any obligation, any lien has matured by the intervention of the bankruptcy matter, and can be dealt with accordingly.

Collier, on Bankruptcy, states that bonds may be paid off, or a mortgage may be paid off by paying interest up to the date of the actual payment. The rule has been applied under Section 10 of the Bankruptcy Act. It was so stated in a case in the Circuit Court of Appeals of the Fifth Circuit, San Antonio Loan & Trust Company versus Booth, 2 Fed. 2nd, 590, that interest could be paid up to the date of payment and the mortgage retired, in bankruptcy.

I could not gather from that opinion whether or not that mortgage had then matured, but, there was cited in that

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case, the case of Coder versus Arts, in the Supreme Court of the United States, where it appears it was first decided by the Eighth Circuit, that the mortgage should be called ahead of maturity and paid off, and it appears on the face of that proceeding that it was called and paid off before the maturity of the mortgage.

It seems to me, your Honor, that when a case gets into bankruptcy, then it is governed completely and entirely by the Bankruptcy principles. One of those principles is that debts can be paid off and that all debts mature by the very happening of bankruptcy, and that therefore the Court is entirely within its rights in calling in and paying off these First Mortgage Bonds.

As a matter of fact, the Congressional Committee, in discussing Section 77, and the powers given under it, is quoted here in the brief that is mimeographed, and deals with the question of the cash position and the money available for retiring the obligations and saving interest. That is one of the arguments having to do with the interpretation of Section 77.

It is also true, the First Mortgage is in good standing, simply by virtue of the fact that the First & Refunding Bondholders have not objected to taking money on which a lien was impressed in their favor, and paying the First Mortgage Bonds and paying interest that accrued on the First Mortgage Bonds, and so we submit, that an order should be made paying the First Mortgage Bonds.

The Court: Has anyone got any views on that?

Mr. Bourne: The Coast Line takes no position as to the matter of whether the bonds should be paid. I have heard reference to the proposed order, and I have seen no proposed order, and I would like the opportunity to be heard in respect of the proposed order, because in the prior order, certain statements have been made, with which I don't agree. I do not want any provision in the order to place any obstacle in the way of consummation of the Plan.

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Mr. Patterson: If your Honor please, representing a group of First & Refunding Bonds, we have no objection to the entry of the Order.

With reference to the form of the Order, I would say this: that so far as we are concerned, if the bonds are paid off, in full, not only the eight million, which are outstanding in the hands of the public, but the four million dollars that were paid off, why that would be entirely satisfactory.

Now, as to whether it is necessary to pay the four million or not, that is the question I presume Mr. Bourne was dealing with. May I say this: at the time the order was made by Judge Strum, there was a motion made to prepay all the bonds. At that time a group of institutions—they called themselves "The Institutional Group"——

The Court: Insurance company. I know.

Mr. Patterson: Yes. —Owned at least two and a half million of the outstanding First Mortgage bonds. As a matter of fact, that came up directly at their suggestion. My impression is—my recollection is that their suggestion merely was that their bonds could be paid. At the same time, Mr. Milam did present a motion to pay all of them off. No one else urged that, and Judge Strum, as I recall, did not rule directly.

The Court: He suggested the Commission doing that. His thought was that that might be an aid in the reorganization. But, the Commission came along and said it was not needed.

Mr. Patterson: This motion was heard after the order that you referred to.

The Court: The Commission, itself, has now expressed its opinion otherwise. It recommended two plans, one of which—the last one and the one before, that the money was not needed in reorganization, that it ought to be paid.

Mr. Patterson: We think it would be an advantage of the First & Refunding Bonds to get the First Mortgage Bonds completely out of the picture. As far as the form of the order is concerned, Mr. Bourne may have reference to

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the provision of the order which I had some part in drafting, and that is that the bonds were bought with earnings, which are the property of the First & Refunding Mortgage-holders, by the provisions of the mortgage, and the appointment of Receivers, and they were bought, at least, because we did not know what the future might develop. Those bonds were bought and held by the terms of that order for the account of the First & Refunding Bondholders.

The Court: It comes around now, to where everything is for the account of them.

Mr. Patterson: Yes. So, off-hand, I don't see any difficulty in the order by reason of that provision.

The Court: There is a question in my mind and that is whether or not it would affect this plan. I am not making a decision about it one way or the other until we decide what to do with the Plan.

Mr. Milam: May your Honor please, the Commission could only provide in the Plan for prepayment of the mortgage, but in the order of 1945, whether it should be paid, it should be determined by the Court as a matter of administration. If it needed the money for reorganization, that is different.

The Court: It does not need it, because the Plan does not provide for its use.

Mr. Bourne: I agree fully that the payment can be made, provided there is nothing in the order ——.

The Court: I believe it is clear in everybody's mind that the right thing and the proper thing to do is to get rid of this mortgage.

Mr. Bourne: I am not objecting, provided there is nothing in the order that leaves this for argument. I would like to see the order and see whether there is anything in it that might cause any complication.

The Court: The Trustees have in their right and power, to suggest what they have suggested.

Mr. Bourne: I am not suggesting whether your Honor has the power.

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The Court: Suppose I ought to do it, provided I have the power? What effect would that have on the Plan? Does that vitiate the Plan, or the approval of the plan, or, what might come next? You have expressed your views about it and there is no issue of fact about it. I think we better leave that alone until we decide what to do with the Plan.

Mr. Patterson: Speaking for the First & Refunding Bonds, we are all very much in favor of having the First Mortgage Bonds paid off.

The Court: Well, I do not know any of them, myself.

Mr. Milam: I have enough copies of this, of the brief, to distribute to the other parties.

Mr. Barringer: May I have a word, your Honor?

The Court: Yes, sir.

Mr. Barringer: That is with regard to the powers of this Court with respect to this mortgage. There is no doubt of the fact that the Bankruptcy Court—the Court, in the exercise of bankruptcy powers, has the right to pay off the mortgage if it is due. There have been authorities, cases, in proceedings under Section 77, when the mortgage was due, that it could be paid off in advance of the approval of the Plan. However, you will note that the general order in bankruptcy, No. 18, which is the order dealing with the payment of mortgages by a Trustee. It is expressly made, not applicable—inapplicable to proceedings under Section 77. Why that was, I don't know. But, there it is.

The Court: Well, I think it was to give the Commission a free hand to make the plan.

Mr. Barringer: It is significant in my mind that that General Order in Bankruptcy, which deals with the payment of mortgages and redemption of liens, was not made applicable to proceedings in bankruptcy.

The Court: What is the form? It does not give any power, it just tells you how to do it, doesn't it?

Mr. Barringer: It says—lays down a procedure—yes.

The Court: Is it a form or general order? You refer to it both ways. General order is law, and form is form.

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Mr. Barringer: This is General Order 18 of the General Orders in Bankruptcy, which deals with the redemption of liens. It is expressly omitted from the order, making it applicable to Section 77, by the terms of General Order 49, and I think it was carried over.

The Court: I do not know that as a fact, but there is a reason for it, of course. It just struck me that the reason was that the Court ought not to mess up the record before the Commission makes its plan. I have used some very elegant English, but I think you know what I mean.

Mr. Barringer: They are being asked here to take this action, and our only objection is that this action is being taken in advance of the adoption of the Plan.

Mr. Milam: May I respond to the one question about the General Order?

The Court: How is that?

Mr. Milam: The matter of the General Order covering this matter.

The Court: What does it say?

Mr. Milam: It provides for a certain procedure for Trustees to call in and pay liens. That is No. 48. General Order 49 says this specific order shall not apply to Section 77 proceedings. Evidently, your Honor, it was designed to keep the Court from going ahead without the approval of the Commission, and that it's action should be brigaded with the action of the Commission.

The Court: That is what I was trying to say.

Mr. Milam: It is mentioned and covered, here, and certainly would not be mentioned in general powers of a court in bankruptcy.

The Court: Take the free assets. What are free assets? I would like for you gentlemen to read to me, the three mortgages and what they cover.

Mr. Plimpton: May I make a preliminary statement? In the summer and early fall, it seemed to us, as the party chiefly interested in the free assets, that this was a matter which could appropriately and should appropriately be

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referred to a Special Master to take the testimony as to how the assets were acquired, and what, exactly, they are. Their connection, if any, with the railway company.

Beginning, as I remember it, in October, or, the latter part of September, with, I think, the consent of all interested counsel, we tried to get an Order of Reference of the matter to a Special Master so as to save this Court time.

Owing to the illness of Judge Strum, we were unable to get any such order, or any Judge to sign such an order until December 10. On December 10, Judge DeVane did sign such an order appointing a Special Master to take the testimony. We have had correspondence with the staff of the railway company, who have been very cooperative in agreeing to provide the necessary factual testimony. We immediately obtained the appropriate witnesses for a hearing, after December 10. We came down here, your Honor, during Christmas week, one of my partners did, and testimony was taken actually during Christmas week on this matter before the Master, so it would be out of the way.

This hearing then intervened, and I think that Mr. Frink will bear me out when I say that his staff felt that they could not go on any longer before the Special Master on account of the importance of this hearing.

The status then, is this, if your Honor please. The testimony as to these free assets is almost, but not quite, complete. I will cheerfully go ahead with the hearing before the Special Master, tomorrow, or this evening, or any time that the staff of the railway is able to do it. They have said that they could not do it until this hearing was over. I am, as I say, ready—not able, but at least willing—to go right ahead and have those hearings before the Special Master continue while this hearing is proceeding.

Now, with that background, if your Honor please, I am perfectly willing to argue the legality, the legal points involved as to the free assets——.

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The Court: Well, I will hear the evidence as far as it is taken. If you think—I have no objection to giving you time to submit it before a decision is made. But, I am here to deal with this matter, and I cannot keep it going on.

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(Here followed argument as to assets claimed to be free of the lien of the Mortgages.)

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. . . And at two o'clock P. M., Monday, January 10, 1949, the hearing was reconvened pursuant to adjournment of the preceding session, and the following further proceedings were had:

The Court: Have your seats, please. Gentlemen, I do not know where the burden of proof is, on this approval of the Plan certified by the Commission. I do not think it matters much.

Mr. Patterson: If your Honor please, Mr. Bourne, as I recall at the last meeting, when Judge Strum was considering that the burden was on us, my reading of the Statute would indicate that the Court shall hear objections of those opposing, and those supporting. It is merely an indication. I assume that we will be required to offer our evidence first.

The Court: Well, maybe so. Do any parties make any point on that? I will rule, if you do?

Mr. Bourne: I agree with Mr. Patterson on that.

The Court: That is all there is to it.

Mr. Hickey: Will it be your procedure to hear all those opposed to the Plan before hearing the Atlantic Coast Line?

The Court: Well, that was the question I asked. Whether the report would stand prima facie as made, and stand as made, unless some party contended to the contrary. That appeared, to me, to be reasonable.

Mr. Hickey: That is the way I regard it.

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The Court: A great many people would have the burden of supporting the objections. I suppose there are a good many objections to the Coast Line's position.

To save any talk or explaining about the situation, my understanding is this: from the beginning, the St. Joe Paper Company, as now owned—it was not known by that name before—wanted to acquire the railroad and sought to acquire the stock before the Receivership. That did not work. It has now gotten around to where there is a contest between the Coast Line, the party desiring to take over the road and run it, and contested by the Lynch Interests, and also that the St. Joe Paper Company still wants to run the railroad. The right to run the railroad is a franchise of the corporation. That is one of the things. I do not know whether the Commission valued that or not. It seems to be the chief value, now. As to the contention, now, each party thinks it is a valuable right. I am worried. I do not know if it should be independently valued, or, matters of that sort or not. And then, there are other questions that stick out like a sore thumb. That is, whether an involuntary merger, by Section 77, was contemplated. As I understand, the Commission acceded to the view that that can be done, although a minority dissented. But, there is still a question of what, under all of the circumstances, will be fair and equitable as to the property rights of the people concerned. That seems to be, finally, the responsibility of the Court. That is the situation about that question. The law question. Then, as to the situation of the parties in this case. And, there are minor questions of valuation. The Commission split wide open on that originally, and on the seriousness of the public interest. It is on those questions that the Commission's findings ordinarily should be based. It should not be on me. I know nothing about railroad valuations or public interest. But, there is a possibility, of course. The Commission might have applied the wrong principle of law or overlooked something. I am giving you my opinion from reading these things last

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evening, and those are the things that interest me at the moment. So, I am giving you my opinion. This is just my general attitude, as I have it now. Everybody is satisfied what the Commission did, one way or the other, except the Coast Line, and, it is a question of whether the satisfaction is well grounded or not. These other questions of valuation may require a ruling of the Court to be made. That is what I have got in my mind. Now, gentlemen, what is in yours?

Mr. Patterson: If your Honor please, there are certain gaps that it might be advisable to make some statements about. I do not want to argue the case, but I would be glad——

The Court: Is there to be any new evidence of any sort?

Mr. Patterson: Yes, sir, we will have some evidence.

The Court: Let us receive the evidence first.

Mr. Patterson: You would rather have the evidence first?

The Court: Yes.

Mr. Patterson: Yes, sir.

Mr. Bourne: If Mr. Patterson does not object, I have one formal matter, your Honor, perhaps, that we should take care of first. After the Commission's report of March 25, 1948, was issued, a special meeting of the stockholders of the Atlantic Cost Line Railroad Company was held, and pursuant to the action of the stockholders, there has been a formal adoption of the Commission's plan, and in October, 1948, we filed in this Court, a notice, dated October 21, 1948, to which were attached, copies of seven documents lettered "A" to "G". Copies of all of these were sent to counsel who were in the case at the time, and I have a copy for anybody else who was not in the case at that time.

Now, I can either introduce, as one exhibit, a copy of that notice, or, if it is satisfactory, it can be stipulated that the original notice, which is on file in the Clerk's office, will be deemed a part of the record.

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The Court: I think you should deal with it in some manner.

Mr. Bourne: I suggest that it be by stipulation, that the original notice dated October 21, 1948, attached to the Plan as Exhibits "A" to "G", be deemed, officially, a part of the record of the Court.

The Court: And, of course——

Mr. Bourne: They prove themselves.

The Court: —they prove themselves?

Mr. Bourne: Yes.

The Court: Is there any objection to that method being followed?

. . . To which inquiry there was no response.

Mr. Bourne: I think it may be helpful, your Honor, if it may be understood——

The Court: Just a minute.

Mr. Milam: I thought the notice was duly served and introduced in evidence and filed in the Court. I think they speak for themselves.

The Court: I have not seen them. I suppose they are certified copies of minutes, or something like that.

Mr. Bourne: Yes.

The Court: I suppose they can be introduced in evidence.

Mr. Bourne: To bring the matter to a head, I will offer in evidence a copy of the notice with the attached copies of certified copies. If there is any objection I will arrange to have the original brought up from downstairs.

Mr. Patterson: I think Mr. Bourne is out of order. That is either a part of the record or not. I would object to him introducing testimony here with reference to the statement that he has just made, that he intends to prove it. He can do it when the time comes. If it is part of the record, it is part of the record.

The Court: I do not know how it would stand unless some indication of its truth were given. The Commission

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has not informed me that it is so. I am bound by what they said. But, he just said that by filing in court.

Mr. Bourne: If Mr. Patterson objected to it, I withdraw the offer.

The Court: I think the objection is good. Go ahead.

Mr. Patterson: If your Honor pleases, the bulk of my testimony will be documentary. I shall ask your Honor to bear with me while I read some portions of it.

I would like to have the privilege of using the copy instead of having to refer backwards and forwards to the original in the file. It will simplify the reading.

The original is an original of the interrogatories that were served on the Atlantic Coast Line Railroad, and their answers to those interrogatories. I am using my copy just to save turning backwards and forwards. Omitting the introductory matter, the first interrogatory was:

"No. 1: Please state fully the nature of the agreement between the Atlantic Coast Line Railroad Company and the Trustees of the Estate of Mary Lily Flagler Bingham, under which the assignment of the claim of the Estate against Florida East Coast Railway Company was executed on October 18, 1945".

Mr. Patterson: These two assignments were dated in, one in '45 and one in '46, and they were offered by the Coast Line in the initial stages of the hearing before the Commission. On their face, they are regular forms of assignment of the claims of these two parties. One, the Trustees and the other, the Car Ferry Company.

"1. The agreement between the Atlantic Coast Line Railroad Company and the Trustees under the will of Mary Flagler Bingham was contained in an assignment, dated October 18, 1945, a copy of which is attached as Exhibit "A", a letter from C. McD. Davis, President of the Atlantic Coast Line Railroad Company to Mr. W. R. Kenan, Jr., and Mr. L. C. Haines, Trustees of the Estate of Mary Flagler Bingham, dated October 20, 1945, a copy of which

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is attached as Exhibit "B", and a letter from Mr. Kenan to Mr. Davis dated October 23, 1945, which is attached as Exhibit "C"."

The next question is the same question and relates to the claim of the Florida East Coast Car Ferry Company, and the answer is identical, but differs—refers to a different series of letters, which are attached.

Now, I think it might be advisable to pause here and read those letters. They are very short. We will read one series and I will point out the only difference, so as to avoid reading the letters in detail.

The first letter is dated October 20, 1945. It is dated, Wilmington, North Carolina, on Coast Line stationery, addressed to Mr. W. R. Kenan, Jr., and Mr. L. C. Haines, Trustees of the Estate of Mary Flagler Bingham, New York, N. Y.

"Gentlemen:

"I acknowledge receipt of the assignment of the claim of Trustees under the will of Mary Flagler Bingham against Florida East Coast Railway Company. I enclose herewith, check payable to the Trustees of the estate of Mary Flagler Bingham, for $1,052.63, and confirm our agreement to pay to the estate, fifty per cent of the balance of whatever may be realized on this assigned claim, after deducting the $1,052.63 and any reasonable legal fees and expenses which we may incur in connection with realizing on the claim. If any realization should be in the form of securities, they would be valued by mutual agreement or sold, and the agreed value or the proceeds of sale would represent the amount realized.

"Very truly yours, C. McD. Davis, President".

The next letter is dated October 23, 1945, a letter from Mr. Kenan to Mr. Davis.

"This will acknowledge your letter of October 20th, addressed to Mr. Haines and myself, as Trustees under the

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will of Mary Lily (Flagler) Bingham, with your check for $1,052.63, cash payment under the agreement entered into between such Trustees and the Atlantic Coast Line Railroad Company on October 18, 1945."

Now, the two letters that relate to the other claim are identical in form, the only difference being that they are addressed to the East Coast Car Ferry Company, to Mr. Kenan, as President of the Florida East Coast Car Ferry Company, and the amount paid was $3,947.37. The total of the two claims is an even five thousand dollars.

And then Mr. Kenan, as President of the Car Ferry Company, acknowledged receipt of the check and confirms the agreement.

The third question is,

"3. What officer or officers, agents, or representatives of the Atlantic Coast Line Railroad Company conducted negotiations with the Trustees of the Mary Lily Flagler Bingham estate for an assignment of their claim against Florida East Coast Railway Company, and what officers, agents or representatives of Atlantic Coast Line Railroad Company conducted negotiations with the officials of the Florida East Coast Car Ferry Company for an assignment by said Ferry Company to Atlantic Coast Line Railroad Company of its claim against Florida East Coast Railway Company."

Mr. Bourne: Mr. Patterson, will you wait until I get the original?

Mr. Patterson: I have the original.

Mr. Bourne: May I have it?

Mr. Patterson: If you wish, I will use my copy and give you the original.

Mr. Patterson: The answer to that is:

"3. F. B. Adams, Chairman of the Board, and C. McD. Davis, President of the Atlantic Coast Line Railroad Company, conducted negotiations with Mr. W. R. Kenan, Jr.,

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and Mr. L. C. Haines, the Trustees under the will of Mary Flagler Bingham, and representatives of the Florida East Coast Car Ferry Company."

The fourth interrogatory:

"Did Atlantic Coast Line Railroad Company or any officer, agent or representative thereof, prior to delivery to it of the assignments of the claims of the Bingham Estate and the Florida East Coast Car Ferry Company, advise the assignors of said claims, or either of the motive or purpose of Atlantic Coast Line Railroad Company in obtaining assignments of these claims to it, and of the use to be made of them by it in the Reorganization Proceedings of the Florida East Coast Railway Company, either in proceedings before the Interstate Commerce Commission or before this Court."

Answer:

"4. Yes. Mr. Davis informed Mr. Kenan and Mr. Haines in substance that the Atlantic Coast Line Railroad Company expected a technical objection by St. Joe Paper Company that Atlantic Coast Line Railroad Company had no right to file a Plan under Section 77 or the Bankruptcy Act; that the Atlantic Coast Line Railroad Company did not consider that technical objection sound; but, that Atlantic Coast Line Railroad Company thought that the acquisition of the unsecured claims might be useful to the Atlantic Coast Line Railroad Company in eliminating the anticipated technical objection."

The fifth interrogatory·

"5. Did the Atlantic Coast Line Railroad Company, through any of its officers or through any agent, attorney or representative, inform the Trustees of the Mary Lily Flagler Bingham Estate, and the officers of the Florida East Coast Car Ferry Company prior to obtaining assignments of its claim, that it intended to acquire the properties

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of Florida East Coast Railway Company by means of a Plan or Reorganization prepared by it, and did the Atlantic Coast Line Railroad Company through any officer, agent or representative submit to the Trustees of Mary Lily Flagler Bingham Estate or officers of the Florida East Coast Car Ferry Company a copy of any proposed plan or any summary or outline of a plan that it intended to file with the Interstate Commerce Commission"?

The answer is:

"5. Mr. Davis did inform Mr. Kenan and Mr. Haines that Atlantic Coast Line Railroad Company expected to file a Plan for the Florida East Coast Railway Company, under which the properties of the two companies would be unified, but he did not give Mr. Kenan a copy of any proposed plan or any summary or outline of the Plan."

Interrogatory No. 6:

"6. Did the Atlantic Coast Line Railroad Company, or any officer, agent, or representative of it advise the Trustees of the Mary Lily Flagler Bingham Estate, or the officers of the Florida East Coast Car Ferry Company, that it was seeking to acquire assignments of said claims as a basis for participation by it in the proceedings then in progress for the reorganization of the Florida East Coast Railroad Company before the Interstate Commerce Commission or in this Court, in order that it might prevent loss of its interchange with Florida East Coast Railway Company if it were reorganized under the Plan of the Commission promulgated January 8, 1945."

The answer is:

"6. Mr. Davis informed Mr. Kenan and Mr. Haines in substance that one of the reasons for the promulgation by the Atlantic Coast Line Railroad Company of a Plan of unification of the properties of the two railroads was that Atlantic Coast Line Railroad Company feared that if

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there were an independent reorganization, and St. Joe Paper Company had control of the reorganized company, the interchange between Atlantic Coast Line Railroad Company and the Florida East Coast Railway Company would be reduced, to the detriment of both carriers and the public interest."

Interrogatory No. 7.

"7. Was there any agreement of any kind whatsoever between the Atlantic Coast Line Railroad Company and the Trustees of the Mary Lily Flagler Bingham Estate executed simultaneously with or before or since the execution of the assignment of its claim against Florida East Coast Railway Company to Atlantic Coast Line Railroad Company for the sale, assignment or transfer of the stock of the Florida East Coast Railway Company then owned by the Mary Lily Flagler Bingham Estate, or that the owners would under any circumstances use or allow said stock to be used for the benefit of the Atlantic Coast Line Railroad Company in any proceedings or in any way? If any such agreement existed and is evidenced by any written instrument, regardless of its form, attach copies of any written documents signed by a Trustee or the Trustees of said Bingham Estate."

The answer to that is:

"There has never been any written agreement of this subject. Mr. Adams, Chairman of the Board of Atlantic Coast Line Railroad Company, and Mr. C. McD. Davis, President of the Atlantic Coast Line Railroad Company, have discussed the subject with Mr. Kenan and Mr. Haines. They reached an understanding that if the Atlantic Coast Line Railroad Company should desire to acquire the stock it would have an opportunity to do so at a price to be agreed upon at the time of acquisition. No price has ever been fixed, and the understanding has not been reduced to writing."

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No. 8:

"8. Did the Atlantic Coast Line Railroad Company or any officer, agent or representative of it, prior to securing assignments to it of the claims of Mary Lily Flagler Bingham Estate and Florida East Coast Car Ferry Company, advise the Committee of First and Refunding Bondholders of Florida East Coast Railway Company, or any member of said Committee or any representative or agent thereof, of its intention to secure said assignment and, if so, state the date on which it advised said Committee, and whether it also advised the Committee of its purpose for which it was securing or attempting to secure them."

The answer:

"8. To the best of the knowledge, information and belief of the Atlantic Coast Line Railroad Company, the answer to this interrogatory is 'no'."

Interrogatory No. 9:

"9. Did the Atlantic Coast Line Railroad Company or any officer, agent or representative of it submit to the Committee of First and Refunding Bondholders of Florida East Coast Railway Company, a copy of any plan for reorganization of the Florida East Coast Railway Company, prepared by Atlantic Coast Line Railroad Company or any draft of the same or any outline or summary of the same for its consideration and approval?"

Mr. Bourne: Now, if your Honor please, I am going to object to that question and any other questions that have to do with the antecedents of negotiations relative to the history of the Atlantic Coast Line Railroad Company's proposed Plan of October, 1945.

I am quite frank in saying that I do not mind if the evidence goes in, but I think it is clearly immaterial to the issues before the Court, and I think I ought, therefore, to object to it. I would not make the objection if I thought it

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would be limited to the questions and answers in these interrogatories, and the responses, but Mr. Patterson's depositions that have been taken, indicate that he proposes to go at some length into the history of what took place in the development of the Atlantic Coast Line Railroad Company Plan.

Our position is very simple. It is, that the Plan before this Court is the Commission's Plan.

The issues before the Court are very simple. They are, whether the Commission followed the statutory mandates, and whether there is material evidence to support its conclusions, and what happened in the fall of 1945, or earlier, is utterly immaterial, and for that reason I feel I ought to make the objection, and I do make the objection.

The Court: What is the objection? As to relevancy?

Mr. Bourne: Entirely. It is perfectly competent, because these are our own responses and answers.

The Court: The Commission rejected the Coast Line Plan on the ground that the public interest would not tolerate it in some way?

Mr. Bourne: What happened was, the so-called Lynch Plan——

The Court: Is that the Plan you are talking about now?

Mr. Bourne: Mr. Patterson is talking about the Atlantic Coast Line Railroad Company Plan, filed in October, 1945, and which, we will have to say, formed the basis, the broad outline of the finally approved Plan. But, the Commission made several important changes and the Plan now before the Court is the Plan so approved by the Commission. I can explain those changes if you wish.

The Court: I am not clear whether the Lynch Plan did involve the Coast Line.

Mr. Bourne: It did, and that was rejected, then came the Coast Line proposal, and that is the one Mr. Patterson is talking about.

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The Court: The Commission never does talk about a new Plan anywhere. It is a modified Plan all the way through.

Mr. Bourne: That is true.

The Court: I think you are right, and, I think he has a right to present the evidence.

Mr. Patterson: I would not undertake to summarize the purposes at this time. I know testimony will be introduced to clear this up. I will say this much at this time, and, if necessary, I will be glad to go into it. I will say this: none of this testimony was before the Commission. This was all dug out by interrogatories and depositions, after the Commission's Plan, and, it has a very direct bearing on the fairness and the equitableness of the Plan in this Court.

Mr. Bourne: When he said none of this testimony was before the Commission, he makes a rather sweeping statement, because he is not only talking about——.

Mr. Patterson: I am talking about these interrogatories.

Mr. Bourne: I do not accept that as correct. Certainly, there are some things that were not before the Commission, but there were some things in the responses, before the Commission. Under the law he is barred from bringing before the Court, evidence which he could have brought before the Commission and did not.

Mr. Davis, as I understand, both in Washington and in West Palm Beach—he was examined at length in both places, and there has never been any history, in any point in these proceedings, that we declined to answer anything, any question that was asked.

The Court: I do not know what he is trying to prove, except the Coast Line wants it to get in, to offer a Plan.

Mr. Bourne: He is asking whether we consulted with the Deposit Committee, and we said we did consult with the Deposit Committee. He has taken depositions to show communications between Baltimore and New York.

The Court: I cannot see the relevancy at present, but, still, I do not know what he wants to prove.

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Mr. Patterson: I will go as far as is necessary.

The Court: Maybe you better go ahead.

Mr. Patterson: May I repeat this: the Commission's Plan which Mr. Bourne puts emphasis on, as the Commission approving it, it is the sense of the Coast Line's position, that it covers an amount of securities, plus an additional amount, namely, cash. That would never have been in this Plan had the Coast Line Plan not been before the Commission.

The Court: They might have gotten it out of a newspaper. I do not say where they got it, but they could have gotten it out of the newspapers. They could have, and changed it, and sent it to this Court. My question is, whether or not the Coast Line's operations, is not with the Commission, or anything like that. But, they have just written up something on the outside. The gist of the evidence seems to be that way.

Mr. Patterson: This testimony goes much further than terms of settlement. This is a tacit admission that the Coast Line had no interest in this property and was not entitled to file a claim because it had no interest. It bought these claims in order to acquire an interest and bought them from the officials of the Debtor, who, for fifteen years had neglected to press those claims. The Debtor's President and Vice-President were told, by the Coast Line, the purpose for which they were bought. Here was an arrangement between the Creditors, who were the Debtor, the bankrupt Debtor, who had claims they had waived all right to assert, for fifteen years, and were selling them without the knowledge of the Bankruptcy Court or anyone else, to an outsider, to permit an outsider to acquire a technical status by which it could file a Plan of Reorganization.

The Court: Now, you have opened up a larger question. The right of outsiders to buy into a reorganization.

Mr. Patterson: No, sir, I do not question that. But, I do question it under the circumstances; an agreement between the Bankrupt, then, and an agreement to prosecute

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the claims against the Debtor, pay the expenses, deduct them and split the difference, and telling them at the same time that they were buying them. They say it is a technical objection. The objection was, that the Coast Line was not a party at interest and had no right to file anything, and I will have other testimony to support my statements here, to show that it was in the nature of collusion between the Atlantic Coast Line Railroad Company and the Debtor itself, and there would be a controlling interest, the Safe Deposit Company, by which they got into this case. There are other circumstances in connection with it.

The Court: Not against themselves, surely?

Mr. Patterson: The debtor.

The Court: Yes, the Florida East Coast Railway Company.

Mr. Patterson: The Stockholders did.

The Court: Yes, but that is not the Debtor.

Mr. Patterson: Yes, for the purposes of bankruptcy, it is. The stockholders' claim against their own corporation for money voluntarily advanced to them——

The Court: It may be subordinated to them, but it is not the Debtor.

Mr. Patterson: It is not the Debtor, but the stockholders, and, the stockholders were the owners of the agreement, and, the stockholders admitted these things before. The Debtor admitted it, and the creditor, himself, by taking no position.

The Court: After the Commission ruled two or three times that the Stockholders had no interest and the Creditors had no interest, I do not think the Coast Line got much when they got these claims.

Mr. Patterson: Oh, yes, they did. They got a technical status, which enabled them to open up this case and put the Plan in.

The Court: Lynch got it opened up. And then the Coast Line came in with an independent Plan, you say?

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Mr. Patterson: That is right.

The Court: It was a good plan and the Commission thought so, and this Court thought so, and, I do not see why we should knock it out.

Mr. Patterson: I think it goes to the equity of the Plan.

The Court: The St. Joe Paper bought in.

Mr. Patterson: I am not questioning the right to buy in, but the right to buy from the Debtor, these claims,——

The Court: The St. Joe Paper Company might have better claims, but, they are doing the same thing.

Mr. Bourne: There is nothing secret about it, your Honor. We filed these claims. Furthermore, I do not read the Commission's report to say that. It was in view of the order reopening the case. As your Honor pointed out, there is no material distinction between the Coast Line's position and the St. Joe Paper Company, which bought bonds, and finally, I am completely in accord with what your Honor says, that the Commission, in approving its Plan, can take its ideas from any source whatever, provided only that its judgment is honest and supported by the record, and that it complies with the statute.

The Court: While I am agreeing with you about the law, I think he has a right to present his evidence, and I think he should have his remedy.

Mr. Bourne: I made the objection because I thought it was my duty to make it.

The Court: All right, go ahead and offer your evidence, and then I will rule.

Mr. Bourne: May I take an exception to this question —to the ruling on this question and other questions that are similar, covered in the same line?

The Court: You can make your objections, as they come along.

Mr. Bourne: It is understood my objections apply to all of this testimony, including depositions which may come up later?

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The Court: All right.

Mr. Patterson: Which one was that?

Mr. Bourne: No. 9.

Mr. Patterson: No. 9.

"Yes, to the Chairman of the Committee for the Committee's consideration and a statement of its position, but not for it's 'approval' in any legal sense."

Mr. Patterson: No. 10:

"10. If the foregoing question is answered in the affirmative, state to whom said document or documents were furnished, and whether the same were discussed, and whether or not any member of the Committee, or any representative thereof participated in the preparation or drafting of said Plan, or render any advice or services in connection therewith, and whether said Committee approved the same before it was filed with the Interstate Commerce Commission."

The answer is:

"10. To the best of the knowledge, information and belief of the Atlantic Coast Line Railroad Company, the answer to this interrogatory is as follows:

In the period prior to October 23, 1945, when the Plan of Reorganization proposed by the Atlantic Coast Line Railroad Company was filed, there were several discussions between representatives of the Atlantic Coast Line Railroad Company and representives of the Committee ——".

The Court: Which Committee is that?

Mr. Patterson: Five Percent Committee.

"——of the Committee during which the latter made suggestions as to the contents of the proposed Plan, and Atlantic Coast Line Railroad Company was advised, in substance, that the Committee would consider the Plan as filed acceptable, subject to a reservation which was later stated at the hearings by Mr. Fitzgibbon, counsel for the Committee. It is impossible to name all of the representa-

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tives of the Committee with whom any discussions were had, but the principal discussions were with Mr. Arthur M. Anderson, Vice-President of J. P. Morgan & Company, Inc., Chairman of the Committee, and with Mr. Anderson's associates in J. P. Morgan & Company, Inc."

No. 11:

"11. Did the Atlantic Coast Line Railroad Company or any officer, agent or representative of it, prior to acquiring assignments of claims by the Bingham Estate and the Car Ferry Company, submit its so-called Plan of Reorganization of the Florida East Coast Railway Company to any officer or governing body of the Safe Deposit & Trust Company, to secure its approval of the same before filing it, and did said company approve same?"

The answer is:

"11. During the period while the Plan of Reorganization, dated October 22, 1945, filed by Atlantic Coast Line Railroad Company, was being developed, drafts and data were transmitted by representatives of the Atlantic Coast Line Railroad Company to representatives of Safe Deposit & Trust Company of Baltimore, particularly Mr. Thomas B. Butler, President, and a director of Safe Deposit & Trust Company of Baltimore, and Mr. Robert K. Frey, Assistant Secretary of that company, and Messrs. Butler and Frey transmitted data, comments and suggestions to representatives of the Atlantic Coast Line Railroad Company. This course was followed in order to ascertain the views of, and obtain the benefit of any suggestions from, the responsible officials of Safe Deposit & Trust Company of Baltimore, and not with the idea of obtaining their 'approval' in a legal sense.

"Mr. Butler and Mr. A. E. Duncan, a Director of Safe Deposit & Trust Company of Baltimore, were, and still are, also members of the Board of Directors of Atlantic Coast

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Line Railroad Company, and in that capacity they analyzed the Plan before it was filed and voted to authorize its filing."

Now, No. 12.

"12. Did any officer, agent or other representative of the Safe Deposit & Trust Company participate in the preparation of the Plan of the Atlantic Coast Line Railroad Company, which was filed with the Interstate Commerce Commission and, if so, in what respect and to what extent, and was Safe Deposit & Trust Company at that time an owner and holder of bonds of the Florida East Coast Railway Company"?

The answer is:

"12. No, except as indicated in the response to the preceding interrogatory. To the best of the knowledge, information and belief of Atlantic Coast Line Railroad Company, at that time Safe Deposit & Trust Company of Baltimore held as Trustee for a large number of Trusts, several hundred thousand dollars of Florida East Coast Railway Company bonds."

Mr. Patterson: That concludes the interrogatories and the answers. I suppose Mr. Bourne will want to object to the depositions, as he indicated. These are the depositions that were taken, of Mr. Davis, President of the Coast Line and Mr. Butler, President of the Safe Deposit & Trust Company.

Mr. Bourne: I understood that I had, on the record, a general objection to this line of questioning.

The Court: As to where this Plan originated? And, those that you dealt with before it went to the Commission. I understand that.

Mr. Bourne: Yes.

Mr. Patterson: Here is a copy of this record, if you want it.

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. . . And thereupon the depositions of Mr. C. McD. Davis and Mr. Thomas B. Butler, were opened in the presence of the Court.

Mr. Patterson: This is the direct examination of Mr. Davis.

Mr. Bourne: Won't you give the date?

Mr. Patterson: All right. These were taken in New York, September 10, 1948.

. . . The deposition of Mr. C. McD. Davis, taken before V. F. Halter, September 10, 1948, in New York City, was read to the Court by Mr. Patterson, being in words and figures following:

"Direct Examination by Mr. Patterson:

"Q. Mr. Davis, when did you become President of the Coast Line? A. In 1942. October of '42.

"Q. You have been connected with them for a great many years? A. Yes. About—since 1893.

"Q. What year did Mr. Henry Walters die? Do you remember? A. I do not remember. I think I could inquire of Mr. Lemmon, who is there.

"Mr. Lemmon: '31.

"A. That would be my guess. I did not want to make a statement that was not accurate.

"By Mr. Patterson:

"Q. What position did Mr. Walters hold with the Coast Line at the time of his death? A. He was Chairman of the Board of Atlantic Coast Line Railroad Company.

"Q. Who succeeded him as Chairman? A. Mr. Lyman Delano succeeded him as Chairman. Mr. Delano died on July 23rd, 1944.

"Q. Who succeeded him? A. Mr. F. B. Adams succeeded Mr. Delano. There was an interim of two or three

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months when we did not have a chairman, but, when one was elected, it was Mr. Frederick B. Adams.

"Q. What relation, if any, was Mr. Delano to Mr. Walters? A. A nephew.

"Q. A nephew? A. Yes.

"Q. And what relation, if any, was Mr. Adams to Mr. Walters or Mr. Delano? A. Mr. Adams' wife is, still is—was a sister of Mr. Lyman Delano, and a niece of Mr. Henry Walters. Mr. Walters' only sister was Mrs. Warren Delano, and the mother of Mr. Lyman Delano and Mrs. F. B. Adams.

"Q. Has Mr. Redmond any connection with the Walters' family? A. Yes. Mr. Redmond married a Miss Delano, a sister of Mrs. Adams, and of course, a sister of Mr. Lyman Delano, now deceased.

"Q. Mr. Walters, at the time of his death, was President or Chairman of the Board of the Atlantic Coast Line Company of Connecticut? A. Yes. He was Chairman of the Board and President of the Connecticut Company.

"Q. And Mr. Adams succeeded him in that position? A. Your question was, Mr. Delano or Mr. Walters?

"Q. Mr. Walters, first. I mean, Mr. Delano succeeded him? A. I thought you wanted to get it in sequence.

"Q. That is right. A. Mr. Delano succeeded Mr. Walters, and Mr. Adams in turn succeeded Mr. Delano.

"Q. At the time of Mr. Walters' death, did Mr. Delano have any connection with the Coast Line? A. Oh, yes, sir.

"Q. What was it? A. At the time of Mr. Walters' death, Mr. Delano had the title of Executive Vice President of the Atlantic Coast Line.

"Q. He was an active officer of the Atlantic Coast Line? A. He was an active officer of the Atlantic Coast Line.

"Q. Was Mr. Adams actively connected with it after that? A. Mr. Adamas had been a Director of the Coast Line for thirty—maybe thirty-three years. I won't be exact

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about that, but he is the senior director in point of service on the Coast Line board today.

"Q. He is not an active officer? He is just a Director —except Chairman of the Board? A. Well, if you mean an active operating officer?

"Q. Yes, sir. A. No. As Chairman, he had general supervision over matters affecting the railroad and all departments, but the operation of it, of course, is on the line of road.

"Q. Mr. Redmond, I believe is a lawyer in New York? A. He is a lawyer in New York.

"Q. He is not on the Board of Directors? A. Yes. He is on the Board of Directors.

"Q. Is he on the Coast Line board also? A. Yes.

"Q. Now, what connection, if any, did Mr. Delano have, in an official position or director, with the Safe Deposit & Trust Company? A. Mr. Delano was a Director in the Safe Deposit & Trust Company, but never held any office in the Safe Deposit & Trust Company.

"Q. Mr. Adams was also a director? A. Never. He has never been a director in the Safe Deposit & Trust Company, and he is not one now.

"Q. Mr. Redmond is not, now? A. Mr. Redmond has never been a director in the Safe Deposit & Trust Company.

"Q. Mr. Adams, the first connection, as I understand, that the Coast Line had with this case, was through a proposal made by Mr. Lynch in the fall of 1944.

"Mr. Bourne: You said, 'Mr. Adams', you mean Mr. Davis?

"By Mr. Patterson:

"Q. I mean Mr. Davis. I am getting old. A. As I interpret your question—I guess that is off the record; will you read it, please?"

. . . The question was read to the witness.

A. No. That isn't right. As I testified in the hearing before the Interstate Commerce Commission, in Docket

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F. E. C. 13170, Mr. Lynch had conferences with me, and then the next day Mr. Delano, here in New York City, sometime in 1943, the date of which I think is in there.

"Q. In '43? A. In 1943. Now, of course, I had many conferences with Mr. Delano about this East Coast matter, and, as I said a few minutes ago, he died on Sunday, July 23, 1944. On the Monday preceding his death, which, of course, was the 17th of July, I had my last talk with Mr. Delano on the subject, and he said that during the week, he and I would go over and see Mr. Kenan, whose office in New York is 120 Broadway, and our offices are 71 Broadway, and talk about the common stock which was held by Mr. Haines and Mr. Kenan as Trustees. Of course, that conference was never held, because Mr. Delano became ill that week and died on Sunday the 23rd of July, 1944. When Mr. Adams became Chairman of the Board, I talked with him about the matter, and, of course, he had some general familiarity with it but not possibly—nothing like the touch that I had with it, and he and I went up to Lockport and talked to Mr. Kenan, and the date, I don't recall from memory, but it was in September, 1944. The date could be supplied, if it's important.

"Q. Well, now, see if I understand you correctly. You and Mr. Delano had had some conferences with Mr. Kenan, previous to— A. No, I didn't say that,——

"Q. —His death? A. No, I didn't say that. I said I had conferences with Mr. Delano every couple of weeks or so, and I saw Mr. Lynch on some date in 1943, and, of course, later in '44, the Lynch Plan, so-called Lynch Plan was prepared by the Lynch interests and was accepted by the Atlantic Coast Line.

"Q. Now, you say it was prepared by the Lynch interests. I suppose it was the result of negotiations between you and Mr. Lynch, was it not? A. Well, they submitted it. Yes. That, as you recall, was a stock purchase plan or proposed stock purchase plan, where we were to take

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sixty per cent of the common stock. That was disapproved by the Commission.

"Q. In preparing that Plan, Mr. Lynch had, of course, the benefit of your point of view before he submitted it, finally? A. Well, it was his proposal. We accepted it. We did not initiate it, or——

"Q. As I understand that the written proposal was his. But, in the negotiations, is it not true that you all had to discuss the terms of purchase and so forth? Before that? A. Well, it told us what he was going to propose and we accepted it, finally.

"Q. He named the terms, without any indication from you, that it would be acceptable to you? A. Well, he named the terms and we told him it would be acceptable. Finally.

"Q. And that was submitted in the fall of '44? A. That is right.

"Q. Now, you say that you and Mr. Adams went to see Mr. Kenan in September, was it, of '44? A. '44. That is my recollection. I do not recall the exact date.

"Q. You went over there to see about the stock, did you say? A. Yes. At that time Congress was considering legislation on reorganization of railroads, and the Hobbs Bill was then the prominent piece of legislation under consideration by Congress, and, we didn't know what value the stock might have to us. We had never—we just had a verbal understanding about that; about the purchase of that stock. I went through all of that with you in 1945, and, unless you want me to repeat it, I won't undertake to do so here.

"Q. I do not recall your going over it with me. But, you had an understanding with Mr. Kenan, then, in reference to the stock. What was the understanding? A. The understanding was that we could purchase it, and that understanding is such that we could purchase it if we wanted to, on the terms to be agreed upon at the time the transfer would be made, if it were accepted.

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"Q. And under the Hobbs Bill, which was later changed into the Reed Bill, and there were provisions in there which would have permitted the stockholders to dismiss the Bankruptcy proceedings. A. My reference to the Hobbs Bill was in a very general nature. We knew that Congress had under consideration, some legislation, and at that time the Hobbs Bill was the one under consideration, and we knew that might put life into the common stock in railroads in reorganization, and we thought it advisable for us to have an option on that stock if we wanted to take it over. We, of course, had been told that others had tried to buy it, and had not been successful in doing so.

"Q. There was a bill that was finally passed, which was vetoed by the President, as I recall. A. Oh, yes. My reference to the Hobbs Bill and then later the Reed Bill, really had nothing to do with the—our purchase of it. But, we just knew merely that Congress was planning to do something, and we did not know what form it would take.

"Q. Let me go back a minute to your negotiations with Mr. Lynch. Do I understand your statement to be that Mr. Lynch initiated these negotiations? A. Oh, absolutely.

"Q. He must have made one or two proposals to you before you finally accepted the one that you did. A. I said that we accepted the so-called Lynch Plan of '44, finally.

"Q. In other words, he had made other proposals previously? A. I don't recall what they were. Yes.

"Q. I am not interested in that. A. No.

"Q. Now, before accepting that proposition, was it submitted to your Board of Directors? A. I don't recall definitely about that.

"Q. Was it submitted to any of the Bondholders of the Florida East Coast? A. No. Other than the Deposit Committee.

"Q. Other than the Deposit Committee? A. Yes.

"Q. The Safe Deposit was also—? A. Yes, the Safe Deposit Company also.

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"Q. It was submitted to both of those? A. Well, it was mentioned to both of those. As a matter of fact, I now think Mr. Lynch had his own direct contact with the Deposit Committee at the time he was negotiating with us.

"Q. But, you did not discuss it with the Deposit Committee yourself? A. Yes, we told them that we accepted, but that is all we did, as I recall.

"Q. That was after you accepted it? A. Well, yes. That was after we accepted it. We told them we were going to accept it but our mind had not been made up, at the time, that we would accept, at the time the Deposit Committee was notified about it.

"Q. Then in January, the Commission's Third Supplemental Order—the Third or Second—Second Supplemental Order, disapproved that proposal and they presented a new, independent Plan of Reorganization. A. You mean the order of January 8, 1945?

"Q. Yes. A. The Commission did issue an order of that date, and they turned, or, failed to approve, I should say, the Lynch Plan, which we had accepted.

"Q. Now, then, the Plan which you later submitted in October, 1945, was prepared subsequent to that decision? A. Oh, yes. You will recall that in 1945, after the date you have mentioned, which was January 8, the date the Commission handed down its report, the Commission was asked to reopen the case and they heard argument on that in May, '45—I don't recall the exact date—and then I think in July, 1945, the Commission did reopen the case, and, what later became the Coast Line Plan, was then evolved and submitted in the fall of 1945. That was not approved, either, by the Interstate Commerce Commission. The Commission made changes in that. Among other things, they increased the cash payment that we were to make. One million and an eighth of a million dollars.

"Q. They made some change in the revised Plan, too? A. Yes. I did not go into that.

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"Q. No, it is not necessary. Well, now, in this second, or, this Coast Line proposal—we will call it that for purposes of identification— A. That is the 1945 Plan?

"Q. '45. A. All right.

"Q. The preparation of that was not begun, you say, until after the Commission ordered the case reopened? A. That is my recollection. Mr. Lemmon, Mr. F. D. Lemmon, who is the Coast Line Vice President and in charge of our corporate matters and fiscal matters, worked on that, and I think—I do not think he commenced to work on it until after the Commission—I am sure he didn't until after the Commission had reopened the case.

"Q. And about that plan, as I understand the interrogatories, you conferred with the Bondholders Committee? A. Well, I did not. The negotiations respecting that were handled here in New York by Mr. Lemmon and Mr. Adams. Of course, I was consulted mainly by telephone and on my visits to New York, but I had none of the data on that or anything.

"Q. What was the purpose of these conversations with the Committee? A. Which Committee are you talking about?

"Q. The Deposit Committee. A. Well, we, of course, approached the Deposit Committee in our effort to merge the Florida East Coast with the Coast Line. We conferred with them about the so-called Lynch Plan, and the other was just a follow-up of that.

"Q. Well, in your answers, the statement is made also that you discussed with the other members or partners of Morgan & Company, besides Mr. Anderson——

"Mr. Bourne: Do you have the answer there, Mr. Patterson? A. I don't recall that.

"By Mr. Patterson:

"Q. You don't? A. I don't think so.

"Q. 'It is impossible to name all the representatives of the Committee with whom any discussions were had, but the principal discussions were with Mr. Arthur W. Ander-

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son, Vice President of J. P. Morgan & Company, Chairman of the Committee, and with Mr. Anderson's associates in J. P. Morgan & Company, Inc.' A. Yes. You said 'partners'. Your question is, 'partners'?

"Q. My question probably was in error. A. (Referring to papers.)

"Q. That is really a corporation. What you had reference to was the associates in the corporation? A. Yes. I didn't talk with anyone but Mr. Anderson.

"Q. Well, we are not acquainted with what took place there".

The Court: Isn't it possible to boil that down a little bit? You are making a tremendous record here.

Mr. Patterson: I do not know of any other way to get it in the record, but I could summarize it. I want to get it in the record. It leads up to part of our case, and our case is built on the factual basis brought out in the interrogatories——

The Court: You presented that to the Commission? I do not think the matter of where they got it, or how they got it, matters.

Mr. Patterson: I think, under this case and the Avon Park case, and other cases, the equity court is guided by equitable principles, and one of the things required by the Bankruptcy Court, is to make a full disclosure. Mr. Bourne has laid his whole case—not his whole case, but a big part of his case on the criticism of Mr. Ball before the Commission—they have criticized him for not making disclosures.

The Court: Well, the pot seems to be calling the kettle black.

Mr. Patterson: There is more than that, if your Honor please.

The Court: What difference does it make? He is entitled to whatever he is entitled to, and no more. Both of them.

Mr. Patterson: This was a deliberate scheme on the part of the Coast Line to acquire the railroad——

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The Court: They want the railroad.

Mr. Patterson: That is correct. The point about that is—the reason they had to do it that way—these exhibits will show it. If your Honor wants, I will be glad to summarize it.

The Court: Maybe I am wasting time.

Mr. Patterson: They couldn't acquire this railroad without getting their foot in the door in some way, so, their whole plan was, first, to use Mr. Lynch. You referred to Mr. Lynch having let them in. I did not intend to go into that at this time. I did not want to go into it. I do not think the Coast Line ever got in. I think their whole participation was illegal from the very beginning.

The Court: My theory is this. A person who has a certain percentage of the debt, has a right to file it. Nobody else has that right. When they get to the Commission, they don't have to adopt any Plan presented to them by the Creditors, but they can add to the Plan or make a Plan themselves. It is the Commission's Plan that was used and not the creditors' Plan. That is the impression I have.

Mr. Patterson: Suppose this was a Mastership of this Court——?

The Court: It isn't. It is the Interstate Commerce Commission.

Mr. Patterson: I know, but the matter was referred to them.

The Court: A Court of equity refers the matter to the Master because the Court can tell him what to do. The Court refers it to the Commission and it can not go anywhere else, and tells the Commission what to do.

It is like complicated accounting, because of the expert knowledge of the Commission in railroad affairs. Because, the details of preparing a Plan are more in the knowledge of the Commission, because they have dealt with these things, these matters of accounting and earnings, and they are before them, and they have had a lot of experience with it, and it saves the Court from having to thresh it

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out in detail in the Courtroom, or before a Master that has no knowledge. You are correct there. You say it is mandatorily sent back to them, but, their duties are to report to this Court, recommendations, or whatever you want to call it, in which they say, here are my findings as to the form of a Plan that should be adopted, the securities, the earning power, the valuation and so forth and so on, and it is sent here and it acquires the standing it does because of the nature of the personnel of the Commission and the provisions of the Statute which the Court has interpreted to be given that report, and the effect given to it does not vary substantially from the effect given a master's report. It is complicated to a certain extent.

It looks like to me, the relevancy of the Coast Line's status and opinions and intentions goes to whether or not they were willing to do what this Plan has proposed, and they said they were willing. Now, they are about to prove that the stockholders ratified that. Whether it is a good plan is all that I have to do with it. I mean by that, whether it is fair and equitable, according to law.

Mr. Patterson: Suppose the Coast Line was a party and the plan was acceptable. Does it mean you cannot rule on that?

The Court: I am inclined to rule that the Coast Line doesn't have to.

Mr. Patterson: Even if a Plan was illegally presented to the Commission, assuming that they were not entitled to file it, and they presented a Plan which was a result of the dealings that they had without the knowledge of the Commission or the Court for the purpose of getting this property for their own benefit—that this Court is bound by the ruling of the Commission? That is where we will get if the Commission is overruled.

The Court: Since you are putting words in my mouth——

Mr. Patterson: No, I did not mean it that way. I mean, that is where it will get to if we follow it through——

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The Court: All I am saying is, the Commission, it does not matter where it gets the idea, if it modifies the Plan it was considering, and modifies it and says we think under consideration that this is the proper way to reorganize the railroad, I do not think I am entitled to inquire where they got the idea.

Mr. Patterson: Even though it would have gone to the fairness and equity, if it had been before the Commission at that time?

The Court: You have a powerfully strong point, as to whether it is fair and equitable to take this road away and give it to someone else. That is a powerfully strong point.

Mr. Patterson: We will come to that. If your Honor would prefer reading it, or, just filing it——

The Court: No, if it is long, and, you have been reading it, I prefer not to read it, but I want you to have the benefit of having offered it. I would like to know about what it is.

Mr. Patterson: Let me attempt to summarize it.

The Court: It all adds up that the Atlantic Coast Line wanted the railroad and cooperated with Lynch and other people, and made up a Plan, that they thought would work, and it didn't work.

Mr. Patterson: That is right. Mr. Davis, in the record here, at the first hearing, made a statement that fits into that general picture. He was asked if he made any effort to buy out the bonds of my client and he said, "No, he knew we couldn't do business with him." I said, "What makes you think you can do business under this proceeding", and he said, "In the theory of the public interest, we think we have a plan which will appeal to the Commission."

The Court: And they won by one majority on that?

Mr. Patterson: That is right. And, we will come to that later on. Well, let me skip along here, because a good deal of this is repetitious.

Now, among other things—here is a question that fits into the picture. I just want to get the benefit of the more important ones.

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Mr. Bourne: This is getting a little difficult to me, your Honor, as to knowing what is being offered and not being offered.

Mr. Patterson: I am offering this testimony now and no mistake about that.

The Court: He offers the statement. He read some of it. He says this is of the same nature and trend.

Mr. Patterson: I asked Mr. Davis this question——

Mr. Bourne: What page?

Mr. Patterson: Page 25. On pages 23 and 24 there are other statements. I won't bother to read them; with reference to the benefits that the Coast Line expected to derive. That will come in in a little different way. On page 25, I asked him this question:

"Q. Well, Mr. Davis, let me ask you: what had happened previous to, we will say, July '45, to change your mind with reference to the future operation of the Coast Line with relation to the F. E. C., from the position you had previously taken".

He said:

"A. What significance has the date, July, '45, other than that was the date it was reopened?

"Q. It was the date it was reopened. I say, what resulted in the change of attitude of the Coast Line at that time? A. Well, we did not change our attitude. We had subscribed to it, in 1944, the Lynch Plan, and all that happened in 1945 was, in presenting the Coast Line Plan, it differed in terms from that submitted by Lynch and accepted by us in '44. The final result would have been the control of the property, by the Coast Line, in either event, but, on different terms."

Now, I will skip along. Then, on the next page, I said:

"Well, what I am asking you is, what changed your position from one of acquiescence of, to an affirmative proceeding or action? A. Well, there wasn't any change in our position with respect to wanting to acquire the East Coast Railway property in 1945, and in 1944. The only thing was

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that the Interstate Commerce Commission had indicated would not approve the stock purchase plan, such as w included in the Lynch Plan, accepted by us in '44."

Now, at the bottom of the page, I asked this question:

"Q. Well, had anything happened to change the lon established relations between the East Coast represen tives and the Coast Line during that period of time? Nothing, except Mr. Ball, of course, through the St. J Paper Company, had acquired a majority of the bon and he felt that he should acquire the road, if he cou do so.

"Q. Well, don't you know that he acquired that major in '42? A. I don't know when he acquired it. I know th he had been acquiring it—and I suppose he is still buyi them. I don't know when—yes, I know that he had a lar number of bonds in '42, of course."

Then I went into some things that he did not know answers to, about the relation between Mr. Delano a Mr. Ball and Mr. Cutler, of the Safe Deposit, and Mr. Ba all of which goes back to testimony that is in the reco The pertinency of that was the way they purposely acquir these bonds, if your Honor please, not all of them—let state it here—it is in the record——

The Court: Mr. Ball is the same as the St. Joe Pap Company?

Mr. Patterson: He was President and one of the Tr tees of the duPont Estate.

The Court: I do not think he has to tell where he his bonds or how much he paid for them, or anything el unless he was deceived in some way.

Mr. Patterson: Here is the pertinency of these qu tions as to the change of attitude.

The testimony in the record shows this: in 1941, duPonts presented the Plan for reorganization which w disapproved by the Commission, on the ground, amo

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other things, that the railroad should—that the ownership of the railroad should be vested in the old bondholders.

The Court: Things went that way until the public interest idea took over, and then went the other way.

Mr. Patterson: That is right. What I am getting at, after that decision, relying upon the finding of the Commission, Mr. Ball approached Mr. Delano, who was then Chairman of the Board of the Coast Line, and the Coast Line Company, and a Director in the Safe Deposit, and said he would like to acquire ownership of a majority of the bonds—he may have said, "Control," I don't remember the exact language——

The Court: That is what he wanted. We all know that.

Mr. Patterson: Yes, sir. And Mr. Delano said, "How can we help you", in substance. Mr. Ball said, "Mr. Anderson is Chairman of the Committee, and I want to buy some of their bonds".

Mr. Bourne: Are you trying to summarize testimony in the Interstate Commerce Records now?

Mr. Patterson: Yes, I am trying to show the pertinency, to tie this question in with it.

At that time Mr. Delano referred him to Mr. Cutler, who was a Director in the Coast Line, and a Director in the Safe Deposit. As a result, with Mr. Cutler's cooperation, he purchased the holdings of the Five Percent Committee—not all of them, but the great majority of them—which gave him a majority of the bonds. As a result of the cooperation, and the assistance of Mr. Delano, who was Chairman of the Board of the Coast Line and Mr. Cutler, who was President, or Chairman of the Board of Safe Deposit, at the same time Safe Deposit pulled down their bonds from the Committee, and came and intervened later in 1944, and assisted us, or supported us at the hearing of 1944. In other words, there was no interest of the Coast Line at that time, or no claim made about any public interest being involved, or about their interest being affected or possibly affected because the Coast Line, through Mr. Cutler and Mr. Delano

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were instrumental in our acquiring control of the bonds—a majority of the bonds.

It was not until after Mr. Delano's death that a different attitude was taken, and that was, as Mr. Davis said here, two weeks after Mr. Delano's death, he tried to buy the stock, and then made the deal with Lynch, and that was turned down in January, the deal was made with Lynch in November and that was turned down in January, and then we come back to the other plan. And, this testimony gives, in more detail, the arrangements with Cutler and the Committee, and Mr. Davis had no part in it, and as a matter of fact, did not know much about it. Mr. Davis repeatedly said they took no interest in acquiring this railroad prior to that date. It is no use to re-read all of these statements.

Mr. Bourne: Your Honor, if it will save time, I am willing to withdraw my objection provided Mr. Patterson will not read——

Mr. Patterson: I do not make trades, Mr. Bourne.

Mr. Bourne: All right, I am doing this only to save time. If he will prefer reading it, and limiting himself to whatever argument he wishes to make later.

The Court: He is entitled to offer his evidence. As I say, the proceedings are subject to review. I just wanted to understand what he is offering.

Mr. Bourne: I just wanted to save time.

The Court: Yes, I appreciate your efforts to save time.

Mr. Patterson: Mr. Butler's testimony did not go into any detail there. We have attached to his deposition, a statement showing the bonds that they held at the time the plan was presented. They owned about eight hundred and seventy-three thousand, I believe was the figure. They withdrew, originally, one million nine hundred seventy-one thousand from the Committee in 1942, when the deal was made——

The Court: Is that the Coast Line, now?

Mr. Patterson: The Safe Deposit, which really controls the Coast Line, in my opinion. I think the report says

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they could control it, but they undertook to say they did not. And then it shows when the bonds were sold, beginning in 1942 and ending in July 1948, the bulk being sold in May and June, 1945, the largest bulk, and the others in '46. In other words, all the time they were trying to get the railroad, they were selling out these bonds.

The Court: Who was buying them?

Mr. Patterson: Not my client. Ours was the same holding we had for some years. We didn't buy any more. And then we obtained from Mr. Butler, a number of exhibits which are identified in the record and which were furnished in response to notice. I cannot take up the time reading those. I do want to refer to them briefly.

The first one is dated July 28, which was just a week or so after the Commission had reopened the case. It is in the nature of a memorandum from Mr. Frey to Mr. Butler, referring to the possibility of a new Plan of Reorganization to be submitted by the Coast Line, and copies of that were sent to Mr. Lemmon, Vice President of the Coast Line, and attached to that letter is a detailed memorandum prepared by Mr. Frey, which was furnished Mr. Butler, which sets out a Plan, and, they worked it out in detail.

The memorandum describes some of the various stocks and bonds to be issued, the distribution to be made, and the creation of a trust fund, and it makes a comparison of it with the Interstate Commerce Commission Plan.

Now, there is one thing in that memorandum which is very important and which goes back to the Commission's report. And, I think I should show the materiality of it without reading it. But, it recites that the Commission had found an annual earning value of a million and a half dollars in the 1945 report. Your Honor will recall that in the last report there was a great deal of testimony offered by the Coast Line to show the savings that would result from consolidation of the utilities, and the Commission, after discussing it in various aspects, finally came to the conclusion that the saving would be, by the Plan, somewhere

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between three hundred and fifty thousand and a million dollars a year, a large part of it resulting from the discharge of employees, particularly those of the general offices.

It is interesting to note on August 3, 1945, this memorandum was prepared by the Safe Deposit Company, which points out that the Coast Line would save $770,000 from the consolidation, and that the East Coast Bondholders should receive an income of $2,276,664.00, a year, instead of a million and a half. And, there are certain arguments then, and he says then that the Atlantic Coast Line determined, sometime ago, that the minimum annual savings from unification would be $777,664.00. That is the statement made, and that was transferred to, or, transmitted to Mr. Lemmon, and the Plan is set out as to revenues that would accrue to the East Coast Bondholders under the Commission's estimate, and set out in pencil columns, and how much would accrue under this new Coast Line estimate.

Mr. Bourne: I think I would have to object to that, particularly on the ground covered by my own objection, but also, that it is not competent for the purposes for which Mr. Patterson is undertaking to use it.

This is merely a memorandum prepared by a junior officer of the Safe Deposit and Trust Company of Baltimore for submission to a senior officer, who in turn transmitted it to the Atlantic Coast Line Railroad Company in New York. And it contains, as Mr. Patterson has said, a draft of the Plan and an examination of that draft shows it bears no resemblance whatever to the Plan the Coast Line finally submitted. I submit, the statement made by an Assistant Secretary of the Safe Deposit & Trust Company in 1945, is purely incompetent.

If Mr. Patterson is allowed to have things introduced with other things, that alone would be incompetent.

The Court: You mean by that, it has no value as an admission?

Mr. Bourne: Absolutely no value.

The Court: I think it is irrelevant.

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Mr. Bourne: So do I.

Mr. Patterson: I think it goes, very vitally, to the good faith of this Coast Line, which is what I am driving at all the way through.

The Court: What you are driving at is bad faith. If anybody wants the railroad, and it is in a position to get it—— The St. Joe Paper Company, too, is in bad faith, but, they are not, either one, in bad faith.

Mr. Patterson: Let me make a very vital distinction between that situation and this situation. We bought the securities in an open market and acquired a position. We did not try to buy the property of the East Coast Railroad for less than the value of the claims against it. We bought our securities in the open market and acquired a property interest in it. Here is a party who had no interest, and who is seeking to acquire it, at a price that they were willing to pay, but which was admittedly less than the total value of the property—I mean the total amount of the claims against it that were secured by proper liens. So, you have a different situation. Here is an interest, seeking a technical position to divest those who had an interest, which was an entirely different proposition when the Commission considered it. I admit that the Commission treated this as a contest between two people for control of the railroad. But, that is not a fair measure of the case before the Commission, either by law or fact. This goes to the question of the fairness of the Plan itself, as an admission, by the Coast Line; Mr. Frey made the statement, but he made it to Mr. Butler and Mr. Butler transmitted it to Mr. Lemmon, and Mr. Lemmon's next letter admits receipt of it and says, "The Plan is so completely described in comparison to my draft I delayed sending enclosed until I had been over yours, which is most interesting, and I intend to go into it very carefully. It is my conviction the theory of the Lynch Plan will not stand up in law".

Mr. Bourne: May I interrupt to say that is the acknowledgment of a man who has not accepted it——

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Mr. Patterson: You can place your own interpretation on it.

The Court: Let me hear it and then I will rule.

Mr. Byrnes: May I say a word?

Mr. Patterson: Yes.

Mr. Byrnes: I hoped your Honor would accept the testimony at this time, and later decide upon its relevancy. At a later time I expect, in argument, to refer to the testimony which is now offered. In a discussion as to whether or not the Plan is fair and equitable, that is the duty of this Court, and in determining it, it is fair, in considering the statement of the Commisson on the subject of these sales, and their disallowance of any amount on that account, to consider the statement contained in this testimony as to the amount of savings that the Safe Deposit officials believed should be given to the bondholders in this case. Of course, it must be tied up with the other testimony in the case as to the connection between the Safe Deposit & Trust Company and the Atlantic Coast Line. But I hope, later, to argue that it was an admission, that, as to that fund, the bondholders were entitled to it. The Commission did not give it to them, and then, that will be for your Honor to determine whether the Plan, insofar as that is concerned, is fair and equitable.

Therefore, I hope your Honor will receive it and later decide, after you have heard the arguments.

The Court: I do not remember exactly what they did, but they did do something about the situation on those things.

Mr. Byrnes: What it said was, the savings will not be immediately apparent, and therefore they did not allow them.

The Court: The Commission said a good many things.

Mr. Byrnes: I expect your Honor, later, to quote that language and argue, if savings were not immediately available, it was no need to disallow them.

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May it please your Honor, I hope, later, to present to your Honor, my views upon the principle that this Court has got to say the Plan is fair and equitable, and not give only its conclusions but its reasons therefor in affirming it, and if on the other hand it is rejected, this Court has to give its reasons for it.

The Court: There is a distinction between the Commission presenting the Plan and the distinction of how they got it and where they got it.

Mr. Byrnes: That is a different question. I am only arguing this particular testimony that is now offered, and which I expect to refer to later, whether or not it is fair and equitable, and, that is a different question.

The Court: You say, if I understand you right, that the Commission did not consider as any part of the property valuation of this transaction, savings the Coast Line would make by it?

Mr. Byrnes: Right. And the reason was, they would not be immediately available.

The Court: And you claim that you have a right to show, in this court, that it is unfair?

Mr. Byrnes: That it is unfair, and the operation of the Coast Line, itself, was——

The Court: That is another question, and there may be something to it. The objection was made, but, the way you tried to show it through another situation, does not constitute an admission by the Coast Line.

Mr. Byrnes: I agree with that. That it must be tied with the testimony in the record as between the Safe Deposit & Trust Company of Maryland and the Coast Line, and its ability to control the Coast Line. That must be shown under that testimony. There was quite a question of whether or not it is an admission by the Coast Line itself. That must be shown and must be argued to you. I hope to show it.

Mr. Bourne: Your Honor, the statement of Mr. Frey contains what must have been estimated or calculated some-

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time ago. I don't know when. There was information on it for days and days and days, and it is a subject which Mr. Turney showed the greatest skill in and craft on. Why should we confuse the record by a lot of reference to something somebody connected with the Safe Deposit & Trust Company of Baltimore said, and, frankly, I have no knowledge of, and it is a fact I have been in this case three years. It seems it is beyond the limits——

The Court: It should go before the Commission if it is admissible evidence.

Mr. Bourne: Yes. We put in evidence, the savings, before the Commission, and the St. Joe Paper Company fought us and said there are no savings. That was the issue between Mr. Turney on one side and myself on the other. We said, we have a duty to perform, and, the public interest will be served by savings, and we put in direct evidence of savings and Mr. Turney found that—fought us and said there would be none, and now, completely reversing their position, they are not content to stay on the Commission record in their position, they are undertaking to take in some evidence of an Assistant Secretary of the Safe Deposit & Trust Company of Baltimore on some reference.

The Court: What is the paper you are talking about now? Is it one of these exhibits?

Mr. Patterson: Before we do that, your Honor, I think this is only a part of of a series of communications between the Coast Line and the Safe Deposit & Trust Company, in which information is freely exchanged and comments made by one or the other, and finally arriving at the plan submitted to the Commission, and which was in the deposition of Mr. Davis that I read.

The Court: Which is the one you refer to?

Mr. Patterson: They are a group, bradded together. Letter dated August 7, 1945, from Mr. Frey to Mr. Lemmon, to which is attached the first memorandum dated July 28, 1945.

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The part we are referring to is found right there. That is the first document.

There are about three or four or five pages, together. August the 7th is the date of the letter. It says:

"At Mr. Butler's request, there are enclosed herewith, copies of memoranda relating to the Florida East Coast Railway reorganization."

The memorandum, accompanying this letter of August 7, of Mr. Robert K. Frey, Assistant Secretary of the Safe Deposit & Trust Company of Baltimore, to Mr. Lemmon, Vice President of the Coast Line.

The savings is referred to on the fourth and fifth and sixth—no, the seventh page. Headed page four.

The Court: On page four?

Mr. Patterson: Yes, August 3, 1945.

The Court: Where is the savings, there, Mr. Patterson, that you are talking about?

Mr. Patterson: It would be found in this paragraph here, and this column here.

"Available net income of the new company would be applied in the order of priority shown below".

The Court: It says, "The Deposit Committee—"

Mr. Patterson: Yes. Now, read on.

The Court: I do not see how the admission comes in. That statement, that the Atlantic Coast Line Railroad Company determines a savings of $766,664.00, seems to be hearsay. It says the A. C. L. has determined that.

Mr. Patterson: Yes, that is correct.

The Court: What is the reply to that?

Mr. Patterson: Here is the reply. Mr. Lemmon's reply. That is the next document, your Honor, in there.

The Court: He does not say anything at all about that savings business.

Mr. Patterson: Yes, they do not contradict it.

The Court: I think that amounts to an admission from him. I cannot see where the savings are, myself. He possibly can, but I could not.

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Mr. Patterson: You mean, you do not see——

The Court: I do not see how it comes out of those figures. He just has it here, there was a savings of $776,000.00.

Mr. Patterson: Yes, that was added into his impression of the plan. He proposes that. He proposes the Plan. That is what that document is, which contemplates the return to the F. E. C. bondholders of $2,276,000.00 a year, instead of a million and a half. His new Plan was to organize a new corporation to be owned by the Coast Line exclusively and issue this security, there, to the F. E. C. bondholders.

The Court: You mean, $776,664.00 is the difference between those two first figures?

Mr. Patterson: That is right, yes, sir.

The Court: The Coast Line answers that the Plan is so close to his, he does not see any difference in them?

Mr. Patterson: Here is the letter of Mr. Adams which follows the Lemmon letter to Mr. Butler.

The Court: "The Plan is so completely described in comparison to my draft I delayed sending enclosed until I had been over yours, which is most interesting, and I intend to go into it very carefully." He did not say it was right or wrong, though.

Mr. Patterson: No, sir, he did not.

The Court: I do not think that is an admission of the Coast Line, unless you say that this other company is authorized to speak for the Coast Line. I do not think they can do that. That is a statement of a third party.

Mr. Patterson: Well, the letter from Mr. Lemmon apparently cuts it down to a million eight hundred instead of two million two hundred thousand. Mr. Adams then telegraphed Mr. Butler and acknowledged that he had received those documents, and then we have another paper, August 7—August 10—August 13—Mr. Adams' telegram of August 13 addressed to Mr. Butler. It reads:

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"Lemmon has forwarded me your Plan East Coast matter, which is having careful consideration. Appreciate this active interest on your part and welcome suggestions at all times. We agree with you special counsel and experienced analyst are called for and on return, Davis, Lemon and myself to New York by Labor Day will be in contact with you again on this matter."

The next document is dated August 21, which is another memorandum by Mr. Frey furnished to Mr. Butler. Now, if your Honor please the materiality of this is, so far as the Coast Line is concerned, found in the relation between the Coast Line and the Safe Deposit. Your Honor understands that the Safe Deposit & Trust Company is Trustee of the Henry Walters Estate and other Estates, and through the Trusteeship they own fifty-six or fifty-eight per cent of the Coast Line Company of Connecticut, which is a holding company, which in turn owns a substantial part of Coast Line Railroad stock, and then the Trust Company owns railroad stock itself—the two, together, the Commission found that it enabled it to control it. The Commission previously found the Coast Line Company of Connecticut does control the Atlantic Coast Line Railroad Company. That is another case.

The Court: What that means is, that they are in position to elect Directors and Trustees and are in a position to choose officers and all of that. That does not entitle them to make admissions.

Mr. Patterson: No, sir, but these are negotiations between the two companies. The Connecticut Company is the holding company and the other company is the owner. The Trust Department, in a sense, as the Commission says, can control it, and in a sense does own it, and preparing these plans and sending them to the Coast Line, and, they are the negotiations between them.

I do not say that is positive proof that the Coast Line said that, but it is a statement made by the principal owner of the stock of the Coast Line to the Coast Line officials,

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and it is in pursuance to the President's instructions. Mr. Butler said Mr. Frey was an expert on reorganizations, with the Safe Deposit & Trust Company, and he outlined his connection. At that time he had a lower title than now, but, he was the expert.

On August 21st, Mr. Frey wrote another memorandum in which he points out the legal difficulties connected with any plan——

Mr. Bourne: Will you stipulate he is not a lawyer, Mr. Patterson?

Mr. Patterson: I do not know if he is or not. I did not ask him.

Mr. Bourne: Will you take my statement on the record?

Mr. Patterson: You can put it on the record.

The Court: I do not think that is proper.

Mr. Bourne: This is a layman's appraisal of the law.

Mr. Patterson: It is a layman's appraisal of the law on the strength of a lawyer's advice, that he refers to.

The Court: If the layman wants to make an admission about his rights, he can do it, but I do not know, yet, about the relevancy of it.

Mr. Patterson: This is another document on the legal matter, and, of counsel advising him.

The Court: Well, I am here to try to settle it if I can.

Mr. Patterson: On September 14, Mr. Lemmon sent Mr. Butler another plan which differs from any of the others, and comes out nearer the present Plan. I would not undertake to compare it without going into detail. However, Mr. Byrnes just called my attention to one paragraph.

The Court: Who is saying this?

Mr. Patterson: Mr. Frey wrote to Mr. Butler:

"Acquisition of the property of the Debtor by outright purchase would be by far the most preferable procedure if such a purchase were feasible. However, I do not believe that there is available at the present time any feasible method for the outright purchase of the property. The

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introduction of a plan which suggests the sale of the Debtor's property would, I believe, be very bad strategy in that, if a sale is had, Mr. Ball, in all probability, will end up as the owner of the property, because it would be almost impossible to avoid a sale at public auction or competitive bidding, which would simply open up the avenue for additional purchasers to present themselves and would intensify what is surely to become a bitter fight over the so-called 'public interests', also, at any public sale, or on competitive bidding, the holder of a majority in dollar amount, of the claims against the Debtor, would be in an impregnable position."

I do not think it takes any legal expert to state that.

The Court: No, I think not.

Mr. Patterson: The other two, I do not think the document of September 22nd and September 26th, which is marked "personal", from Mr. Lemmon to Mr. Frey, would take much explaining. It gives a statement of the Coast Line's position with a lot of figures, and the last documents are dated in October. One of them is another statement with reference to the Plan, by Mr. Lemmon himself.

The Court: Who is Mr. Lemmon?

Mr. Patterson: Vice President of the Coast Line. And to that he attaches some pencil figures, and also a re-draft of the Plan.

Now, if your Honor please, this one shows two alternative plans, and shows the estimated income and the disbursements and so forth, which is not the same as any of the others, but which is more than a million five hundred thousand dollars.

One starts out with two million three hundred seventy-five, and the other with one, nine hundred sixty-one, eighty seventy-five, and I do not know where they come from, offhand. But, it shows they were still figuring on paying more, and then the last one is the October letter in which is contained the statement that was to be given to the public with reference to the present Plan that was finally pre-

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sented to the Commission. All of this was presented by Mr. Butler in connection with his deposition relating to the negotiations that went on between he and the Atlantic Coast Line Railroad Company. The Safe Deposit & Trust Company, being the owner of the largest block—I think some thirty-five or more precent of the Atlantic Coast Line stock, directly or indirectly, through the holding company, or directly, and, the close relations will be shown further by testimony which was available at the original hearings, which I have been undertaking to state here, I think that they show a definite cooperation between the two, designed to accomplish the purpose they both wanted, namely for the Coast Line, which is the Safe Deposit & Trust Company, a substantial owner, or owner of the major portion of it, to get this property, and they were both conferring with each other and submitting plans, and preparing plans and figures, in an effort to work out something they could present to the Commission. In doing so, in their earlier figures, they recognized the certain possibility of the requirements the Commisison would finally make, and they finally came down and offered a million five hundred and had the Commission accept that.

I think it is pertinent and has a bearing upon the relation between these two in the way this thing was developed, and also showing the bearing it has on the fairness, and the equity of the Plan as to the earnings of the allowances made, or, on the matter of earnings, which were recognized by these parties themselves. I think it has a very definite and direct bearing.

The Court: I will consider a little further, whether any of those documents are admissions of fact. It looks like they are opinions and inferences, and it might be objectionable on that ground. If the Coast Line comes out and squarely denies it had a savings in there, for instance, and it was disclosed in there, it looks like there might be some meat in there.

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As to the negotiations, the details of what they did and wanted to do, I think it is irrelevant. I do not think it is relevant that the Commission may have erred in accepting the Plan, for the Commission to have accepted it. If it recommended, after an investigation, that it was satisfied it was all right, and recommended it to the Court for approval, I do not think the Court should go behind the findings and conclusions of the Commission, or go behind anything that occurred before the Commission. There is nothing in the way of any trick, of people trying to buy the railroad and trying to figure the best and cheapest way. I do not think that is the thing that hurts the Plan. The Plan itself is fair and equitable if it treats the people, who own it in bankruptcy, in a fair way. If it isn't treating them right, then the rule is clear. The Court is not bound by what the Commission says. I think that is my responsibility when it comes to the end of the case, and I do not think all of the details and manipulations and statements, is a thing that we have to wash out here. That is my ruling.

Mr. Patterson: I do not want to argue further, after your Honor says that is the ruling, but I would like to call your Honor's attention to one point in a case I had before the Fifth Circuit Court of Appeals. Your Honor may recall the case. The *Avon Park Bankruptcy* case. There were no opinions written by your Court in the case, because it was affirmed, *per curiam,* on the strength of the *Vero Beach* case. On certiorari, it was reversed by the Supreme Court. My argument, there, was,—it was very similar, and the opinion in that case was, that the duty of the Creditors was, full, complete and open disclosure of all of the facts and circumstances. I grant you that the actual basis was entirely different. It was a municipal corporation. The principal was, that when a man comes into court and claims to be a creditor, which they were, and claims an assignment, and offers no information about it and secures the permission of the Commission or the Court, and it was not determined until afterward, it was not approved, and, in a fair and

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equitable way, the whole scheme falls through, and that case was remanded down to the District Court.

The Court: I do not remember the case you refer to. It is too far back.

Mr. Patterson: It said that was a minimum requirement. Full and complete disclosure, and, one of the rules of the general bankruptcy——.

The Court: What was the issue? What did they fail to tell?

Mr. Patterson: What happened was this: a Plan of Reorganization was designed and submitted to the Creditors, and some creditors did not consent——

The Court: Is this a composition or an ordinary reorganization?

Mr. Patterson: City reorganization.

The Court: A reorganization, is sort of a relief.

Mr. Patterson: Yes, a little different procedure, but in order to get the two birds, this man went out and bought up these claims and then voted them in favor of the reorganization, and got the approval of the District Court on the ground he had the necessary number, but in doing so, he did not tell the Court all of the facts, and the case was reversed on that ground.

The Court: He really did not have a majority?

Mr. Patterson: He really did not have the majority. He had bought them because he had other interests he sought to satisfy, just like the Coast Line was buying these things for the purpose of acquiring the East Coast Railroad.

The Court: If they bought them, that is different.

Mr. Patterson: They bought them and paid for them.

The Court: What was the trouble with it?

Mr. Patterson: The trouble was, they had not disclosed the fact that they had other interests. In other words, they were working for other motives than the collection of claims.

The Court: Wasn't it said in that case, the majority of the creditors would have to have two thirds? If they are

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not voting in good faith for the interests of their claim, they are not doing what they should do. Here, these people are not representing anybody but themselves on either side. They are not under a duty to disclose anything to anybody except tell the truth.

Mr. Patterson: It used to be one of the general rules of the Bankruptcy Court, that each of the claimants had to offer proof.

The Court: That is what I said about this reorganization case. About buying it.

Mr. Patterson: There are two cases that do not relate directly to the holding of claims. There are two cases, though, relating to persons who bought bonds,—both corporation bonds—one a utility and the other a coal company. They got three claims and filed a petition for reorganization. They bought them for reorganization. One was the Philadelhia Rapid Transit Company, where the City officials bought bonds for the reorganization, and the Court said it was in such terrible shape it needed it, and these people were honest in what they were doing, but, they only had a technical status as a creditor and acquired these things with a pre-determined purpose of straightening out the affairs of the Philadelphia Rapid Transit Company, because it was not in good faith.

The other was a coal company, a Third Circuit case.

The Court: The Judge had this thing put to him right at the beginning?

Mr. Patterson: Yes.

The Court: Well, it got by that milestone. Now, we are down to the Commission. That is where we are now.

Mr. Patterson: I do not think this Plan was presented in good faith, unless it was presented for the purpose of what they say. The purpose of acquiring the property.

The Court: Whether it is a good Plan.

Mr. Patterson: That is a different issue. As I understand, this testimony is admitted subject to your ruling.

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The Court: This testimony about these admissions, that there was a savings, which you say was not disclosed, I want to read the Commission's record and see whether or not there was such a statement. As to the details of all of the getting of the unsecured claims and selling bonds and conferring with one another and working out what they would like to do, that is all connected with a lawsuit. I do not think that is anything that would condemn the Plan. I might not agree with the Commission as to the result.

Mr. Patterson: I was referring to the evidence, each step.

The Court: I still have not seen anything in these documents that looked to me like an admission, and I do not know what these witnesses said to the Interstate Commerce Commission; whether it looked like they concealed something from the Commission.

Mr. Patterson: In this deposition of Mr. Davis—Mr. Davis did testify before the Commission, and I think, the reading of his testimony, his deposition and his testimony before the Commission, certainly does not disclose the whole truth. Whether your Honor would consider that sufficiently vital or not, would depend a great deal upon the comparison of the testimony.

The Court: It would. I am not sure that would make any difference. I am not sure, there, but what the remedy would be to go back to the Commission and say, "You are misled." The Commission would say, "No, we weren't. We took our good judgment. We know more about it than you do."

Mr. Patterson: The Commission says they know more about it than anybody.

The Court: I do not think anybody misled them, unless they misled themselves.

Mr. Patterson: I want to be sure it is in the record.

The Court: You offered it and I ruled it out, until it well may be proved to be an admission.

The Court: Is there any further evidence?

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Mr. Patterson: If your Honor please, I have some statements here. I have a few copies—sometime ago I filed a petition with the District Court, you might say, against the Trustees, that were in the proceedings, asking for a showing by the Trustees in Bankruptcy of the amount of money that had been expended by the Trustees, under the orders of the Court, for additions and betterments authorized by the Court between July 1, 1944, and January 1, 1947, that were not provided for or included in the rehabilitation program or the report of the Commission. Your Honor recognizes, in the report of the Commission, there is an item of $10,750,000 set aside for what is called the rehabilitation program.

I asked for expenditures for additions and betterments made within that period, that were not included in that program. The Trustees filed a return, and they have printed that return, and it is included in the printed record, and I suppose it was filed in the Court as a reply to my petition and is a part of the record. I desire to call attention to that report which is document 700 of the Receivership Proceedings.

The Court: Let me get the background of this. This is something to do with a matter that the Plan does not treat with?

Mr. Patterson: That is right, as to compensating them for expenditures. Your Honor, I want to make one thing clear.

After this third report came out, when the Trustees were to spend any more money for additions and betterments that were not included within the Reorganization Plan, we took the position, under the report, all surplus, above the requirements, belonged to the East Coast Bondholders, and that the Trustees could not spend that surplus—our money—to make further improvements on the railroad for the benefit of the Coast Line without our consent. Judge Strum solved the problem of permitting the Trustees making——

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The Court: And gave them a lien for it?

Mr. Patterson: And gave them a lien for it, which has not been fully disposed of. In this case, I was seeking a lien for additions and betterments made after July 1, 1944, and before January 1, 1947, because I had liens for all after January 1, 1947.

Now, the testimony on which that program of rehabilitation was predicated, was the testimony given at the May, 1944 hearing before the Commission. It was modified in the 1945 report. I anticipate that there will be some objections made to the inclusion, or to the putting of the expenditures between July 1, 1944, and January 1, 1946, in the same categories as these made after January 1, 1946. But, this includes 1944 expenses, 1945 expenses, and 1946 expenses, and the total, covering additions and betterments, is $4,058,000 not including some $324,000 that was spent and bought Pullman Company stock, which has been paid for out of the cash, as a matter of fact, since July 1, 1947. It was paid for before we realized it had been paid for, so it was not included, but it was made after the report came down. I think most of the other expenditures, in fact all of the other expenditures were made before the Commission's report of 1947.

My purpose in offering it is not in connection with the petition for the lien, which is not under consideration by the Court, but, simply to show the amount expended by the Trustees for this purpose during this time, and I will submit that as an additional exhibit, showing expenditures.

The Court: You offer that for proof of what it says?

Mr. Patterson: Yes. I did not offer it as an exhibit, but I do call attention to it as a document supporting my petition, and, the evidence of that fact. It is in the form of an answer——

The Court: It would be prima facie proof. Does anybody claim it does not? They are officers of the Court.

Mr. Patterson: I can only offer a copy, because the original is in the file in the form of a pleading.

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The Court: Off-hand it looks like to me like a response of an officer of the Court in line of duty as to what he has done. It would be at least prima facie, and that would be my idea about it.

Mr. Patterson: I present this as proof of these expenditures.

The Court: Is there any objection?

. . . To which inquiry there was no response.

The Court: Let it go in. Now, all right, let us take a recess for five or ten minutes.

. . . And thereupon an informal recess was had, thereafter the following further proceedings being had.

The Court: Gentlemen, we haven't got but one reporter, and we do not want to break him down. Is there some way we can agree not to take down the arguments of counsel and so forth?

Mr. Patterson: Yes, sir.

The Reporter: I will stay with you, if you will just give me a short recess now and then.

Mr. Patterson: I now refer, and offer, if your Honor please, an exhibit which consists of several pages, the first one being entitled, "Cash expenditure authorized by Court orders for additions and betterments for period September 1, 1931 to January 1, 1947, exclusive of new 112 pound rails and fittings". This consists of three sheets.

The second one, entitled 2 (i), Equipment Purchased for Cash, which consists of one sheet. A small sheet.

The next one—it is really, I believe, entitled a part of No. 2, and consists of two sheets—one or two—yes, that is right, two sheets. It is entitled 2 (ii), Equipment Covered by Equipment Trusts or Conditional Sales Agreements in Existence at August 31, 1931, being two sheets.

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The next one is marked, 2(iii), Equipment Acquired Under Equipment Trusts or Conditional Bills of Sale since August 31, 1931, in two sheets.

The next one, entitled 3, Expenditures for Rail and Fittings (new 112 pound), that being one sheet.

The next one, entitled 4, Statement of Depreciation and Amortization of Defense Projects, Charged to Operating Expenses, September 1, 1931, to December 31, 1947, being two sheets.

The next one being 5, Statement of Property Retired and Salvage Recovered, September 1, 1931 to December 31, 1947, being four sheets.

The next one, 6, Statement Showing Cost of Constructing the Fort Pierce Cut-Off, etc., as of July 31, 1948 (original authority—Court Document 387, dated June 7, 1944—$1,030,000.00.

The next, 7, Expenditures Reported Which are Included in the Rehabilitation and Improvement Program Provided for in Report of the Commission dated April 8, 1947—Finance Docket No. 13170, which shows a total cost of those.

Now, the document previously introduced, covered only from '44 through '47, and this includes most of those expenditures. They related particularly to that period of time. This covers all expenditures made by the receivers during the ten years of their operation of this railroad, and by the period during the past seven years—eight years, since this case has been in the Bankruptcy Court.

It is divided into several columns and shows the nature of the expenditures, that is, the purposes of them, the year in which they were made, the date on the document, the receiver's, or reorganization document, under which they were authorized, and the amount expended, with the expenditures prorated between (A) and (B). That is, additions and betterments, which were charged to capital expenditures and now charged against operating expenditures and the amount of materials and supplies on hand

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which were used in these various projects, and the totals are given at the end of each of these seven documents.

This was prepared at my request and that of Mr. Adair, who at that time was counsel for the Trustee of the First and Refunding Bondholders, the Chemical National Bank & Trust Company, in September, and was furnished me by counsel for the Receivers. The Trustees, I should say. Copies were also furnished, I understand, to the Atlantic Coast Line, and to all of the other parties who asked for them.

I offer this as an exhibit, Mr. Bourne, as a document prepared by the Trustees from their records.

Mr. Bourne: I have no objection.

> . . . The instrument last above referred to was received and filed in evidence and marked Objector, St. Joe Paper Company's Exhibit No. 1.

Mr. Patterson: Now, for the convenience of the Court, in connection with the argument which we will probably make later on, I offer another small exhibit which consists solely of a comparison we have made of the cash reserve requirements provided in the Plan of January, 1945, and the requirements in what we know as the Third Report, the Plan of April 3, 1947, showing the increase or decrease of each of the items. It is purely a computation made from the two reports. Do you have any objection?

Mr. Bourne: I have no objection.

> . . . The instrument last above referred to was received and filed in evidence and marked Objector, St. Joe Paper Company's Exhibit No. 2.

Mr. Bourne: I take it this is subject to corrections.

Mr. Patterson: Yes.

Mr. Bourne: It is only for reference, and convenience.

Mr. Patterson: That is right, for convenience of counsel and the Court.

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Mr. Patterson: If your Honor please, in order to save time—I want to get credit for a little time saving—I requested admissions by the Coast Line, of certain facts, principally consisting of testimony given by officials of the Coast Line in other cases, and, in that way I sought to avoid the use of large records from which these statements were taken, and to secure the admission of the truth without the necessity of proof otherwise required, and the Coast Line has admitted them, subject to some typographical errors that I would be glad to correct.

Now, if the Reporter wishes, this has been filed in the Court as a document as a request for admissions, and the Reporter need not take my reading of it, unless your Honor desires it.

We requested them to admit the truth of the following facts:

1. That on May 26, 1947, A. C. L. applied to Public Service Commission of South Carolina for approval of the discontinuance of operation of passenger trains 59 and 64 operating between Sumter, South Carolina, and Columbia, South Carolina, and that after hearing on November 26, 1947, the Public Service Commission, by its order No. 5424, denied the Plaintiff's application.

That was admitted.

2. That thereafter Atlantic Coast Line Railroad Company instituted service action in the District Court of the United States for the Eastern District of South Carolina, Columbia Division, against the Public Service Commission of South Carolina, et al., Service Action No. 1879, attacking that order on the ground that the same was "Unreasonable, arbitrary, confiscatory in its effect, null and void and in violation of the Constitution of the laws of the United States.

That was admitted.

3. That attached to its complaint were certain exhibits designated as Sheets 1, 2 and 3, affecting the operating

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results of the Plaintiff's entire railroad system for the year 1946 and the first eleven months of 1947, which was marked Exhibit B.

That was admitted.

4. That a hearing was held in said cause before Honorable Morris A. Soper, Honorable C. C. Wyche, and Honorable George Bell Timmerman, on March 31, 1948, at which Mr. Louis F. Ormond testified for the railroad.

That was admitted.

5. That Mr. Louis F. Ormond is the Assistant Vice President Accountant of the Atlantic Coast Line Railroad Company, and has been with the company for a period of eleven years, and has produced and testified with reference to Exhibit B, as showing the system operation for the year 1946 and the first eleven months of 1947.

That was admitted.

Mr. Bourne: Isn't there a mistake in the letter? Isn't that "D"?

Mr. Patterson: That is correct. Those other corrections, let me know as I go through.

6. That Louis F. Ormond at the time and place and in the cause referred to, testified under oath in said cause, and in his testimony made the following statements: (a) Next, I show you the fixed——

Mr. Bourne: This was, of course, admitted subject to objection as to materiality.

Mr. Patterson: Yes, sir.

Mr. Bourne: I want to make the objection to everything covered by these admissions on the ground that unless they are offered for the purpose of showing there has been a change in conditions since the Commission's approval of the Plan, which makes the Plan which the Commission determined to be fair, now unfair. In fact these documents, I think, will show that insofar as there has been a change, the margin by which the Commission's Plan is more

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favorable than the alternative internal Plan, has increased. Our position is that we are not called upon to retry issues of fact relating to valuations that were tried before the Commission. What Mr. Patterson has done, is to get some testimony in rate cases, which he thinks will be helpful to him in the event of a retrial of an issue of fact, by the Court. Our position is, under the Supreme Court Decisions to which your Honor referred, the only question before the Court, is whether there is material evidence to support the Commission's decisions on that subject. Whether the Commission made an error in a matter of law.

The Court: The objection is noted. I will take it along with the case and dispose of it.

Mr. Patterson: We think this testimony is directly relevant to the Commission's findings in the report. These decisions were made two years before the Commission's report was filed, and they relate to internal matters of management of the Coast Line and to facts primarily for the years 1946 and 1947, which were not available.

Now, referring to these exhibits.

"(a) Next I show you the fixed and contingent charges. That is interest, lease-road rent, and other charges. All of them relate to operating property. None of them relate to any of the investments of the railroad in stocks or any other personal property. They are all represented by mortgages on the actual operating railroad, or by lease-road rentals for a part of the railroad that is operated. Therefore, they should be paid from the results of operations. But, as this statement discloses in the third column, they were far from paid by the results of operations in either of these periods, and the result was a substantial deficit running to $2,476,704 for the year 1946, and $2,973,578 for the first eleven months of 1947.

Now, the rest of the statement is devoted to explaining how the corporation was able to stand those deficits. It took very much of the non-operating income in the form

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of dividends, the results of operations of leased lines, and other factors that have no place in the picture of operating results of the Atlantic Coast Line Railroad Company. Nevertheless, those non-operating incomes were absorbed to the extent of about—oh, I won't quote any percentages, but out of non-operating income for the year 1946, of $4,485,223 shown at the bottom of sheet three of this Exhibit on page 34, we had $2,008,519 left after those funds had been used to pay the deficit from the operations of the railroad. That same showing is made for the eleven months of 1947 on Sheet 35, and there, out of the non-operating income of over six million, five hundred thousand dollars, we had three million five hundred thousand dollars, plus, after we had absorbed the operating deficits."

"Q. Except then for the inclusion of non-operating income in your reports, you have been in the red for both of these years? A. Yes, sir.

"Q. To the extent disclosed here of $2,476,704 in the year 1946, and $2,973,578 for the first eleven months of 1947? A. You have read the deficits from operations.

"Q. That's what I said. A. Yes, sir.

"Q. You were in the red to that extent from your operations. A. That's right.

"Q. And, you made that deficit up from out of income and interests in other property, and investments that were put in other property many, many years ago that had nothing to do with the operations of the Atlantic Coast Line Railroad Company? A. Well, I wouldn't go that far. Back in 1923, and along about that time when they were acquired, they were acquired at that time by money that was produced from the Atlantic Coast Line. But, none of that had been acquired from any operations in the last thirty or forty years."

The next is a further quotation from the same testimony. This is another answer.

"(b) A. Well, the primary factor is that maintenance is cyclical. Unfortunately, it is not possible to maintain

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your railroads year by year, and accomplish a recovery of the deterioration year by year. That is particularly true of your fixed property as distinguished from equipment. In other words, your maintenance of way and structures, such as rails, has a cycle of life running from twenty to thirty years—perhaps longer, and various other types of materials such as ties, track parts, and ballast, have a cycle of life anywhere from five to twenty years.

In the case of the Coast Line, when we entered the war, we were approaching the end of a maintenance cycle. And, our property took a perfectly awful beating. Perhaps there were more military establishments on the Coast Line in relation to its length than any other railroad in the United States. Our movement of the freight and passengers was beyond what we had believed the property had the capacity to transport. As a result of that, and of the further fact that during the war we were unable to get the materials or the men, and the trains were running so rapidly, we perhaps didn't have the time to keep our property up. We went into the post-war era with property which was run down. The same thing existed at the end of World War One, except perhaps the situation was a little exaggerated this time. We had to set out, even before the end of the war, as rapidly as we could, to get the materials and the men to build that property up. Our rails were failing. Sometimes we had as many as four or five rail failures a day. We had one perfectly terrible accident that cost us almost two million dollars. It was not a matter of desire; it was a matter of necessity. So, we went out and we rehabilitated, and have rehabilitated since, and will continue to rehabilitate the Atlantic Coast Line Railroad Company. And, the point is that, although the money got into 1946 in a very large amount and into 1945 in a large amount, it will get into 1948 and 1949 in a large amount. We are simply spending money in those years that should have been spent earlier. And, if you take that money out of those years and increase your earnings proportionately, you've

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got to take it and put it back in the prior years and decrease your earnings proportionately in order to have any comprehensive over-all situation."

"(c) Q. What are the dividends? Dividends on what? A. On stocks.

"Q. On stocks in what? A. Stocks in a variety of things. There are stocks in the L. & N. Line, and stocks in other railways. We have some stock in newspapers, too, but its mostly stocks in other railroads that are United States controlled. Some stocks are in railroads that the company controls, and some stocks in railroads that it doesn't control."

Mr. Bourne: Will you correct that "United States controlled"? It must be "jointly controlled".

Mr. Patterson: It does not make sense. I will accept the correction.

"Q. What proportion of that $2,983,335 considered as dividends, comes from stocks in railroads that your company controls? A. I couldn't answer that without some very elaborate calculations. But, I should say that, if it would satisfy you, the larger part comes from that."

(d) "Q. Mr. Ormond, Mr. Belser asked you about the Coast Line owning other railroads. Does the Atlantic Coast Line Railroad own the L. & N.? A. No, sir.

"Q. Does it control it? A. No, sir.

"Q. Is that where the bulk of this non-operating revenue comes from? A. Yes, sir.

"Q. Does the Coast Line have anything to do with the operations of that property? A. None whatever.

"Q. It primarily has an investment in it? A. That's right."

The next one is:

"(e) Referring to Coast Line's Exhibit "F", the witness said:

"It is reproduced in this exhibit just as it appears, expect with respect to the years 1944, 1946 and 1947. I have

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made the adjustments in net railway operating income, which I have previously testified about in detail. I have also added two additional columns. The last column of the defendant's Exhibit is headed 'Income after fixed charges and other deductions'. My first column is designed to deduct from those figures the non-operating income that was included therein. In other words, that is to produce the operating income after fixed charges and other deductions, for the ten year, or eleven year period. And, that appears in the last column. Incidentally, I have added the year 1947 to the defendant's Exhibit, because they didn't have access to those figures and I did. I simply put them on there for a more comprehensive showing. And, when the non-operating income of $60,116,119.23 is deducted from what the defendant calls income after fixed charges and other deductions amounting to $86,491,960 the result is to produce an operating income after fixed charges of $26,-375,841, or an average per annum of $2,397,804 as compared with the average of $7,867,070 shown by me under the fifth column.

"Q. That shows that the company operated in the red all of those years except the war years? A. Yes, sir. And, down below in the exhibit, I've shown the rate of return on investments as of December 31, 1947, both before and after deducting depreciation, represented by the annual operating income shown on this statement. Now, I want to be perfectly fair about this statement. These figures are not absolute. The reason for that is that all taxes, such as income taxes, are included in computing the amounts, and I have not reduced those taxes in making the deductions for non-operating income, because it would take two or three months to make the necessary calculations. The whole point of the statement is systematically to show that if you take out your non-operating income, and if we knew the figures for taxes to deduct, the results would be that, from an operation standpoint, the company has been in the red except during the war. Now, I don't want to have anyone

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get the idea that these figures are presented by me as being absolute, because they are not.

"Q. They are correct, except for the items that you have explained? A. That's right.

"Q. Now, Mr. Ormond, will you take defendant's Exhibit No. 2, which purports to show net railway operating income for the ten year period, and explain that."

Mr. Patterson: We offered that in evidence and Mr. Belser objected.

"Q. (By Mr. McDonald) All right, go ahead, Mr. Ormond. A. Defendant's Exhibit No. 2 is designed to show the net railway operating income for the years 1937 through 1947, and a breakdown of net railway operating income between freight service and passenger service. In the first three columns of my exhibit No. G, I have reproduced the figures shown on the defendant's Exhibit, subject to the adjustments previously mentioned in the years 1947, 1946 and 1944.

"And I have added two columns. The first of these added columns shows the fixed and contingent charges of the Railway Company, and the second one shows the residue of net railway operating income after they have been deducted. I might stop here just a minute to say what these contingent charges are. They amount to only about four thousand dollars per annum, and are the interest on certain irredeemable certificates of indebtedness that we can't get back from the owners, and that we pay interest on if the interest is earned. It only amounts to about four thousand dollars a year. The remainder of the amount shown in this column is fixed charges in the sense that they have to be paid".

Mr. Bourne: In the second line of that answer, did you read 1937 through 1946?

Mr. Patterson: It should be "1937 through 1946". That was in the admission.

"Mr. Belser: You mean the contingent charges are the four thousand dollars—the smaller.

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"Mr. McDonald: I think the Court understands it.

"Q. What is meant by the fourth column? A. That means deficit. Now, on Defendant's Exhibit No. 2, the heading states that it's designed to show that passenger service deficits are commonplace in years reflecting peacetime economy. Now, I agree with that. And, my exhibit goes a step further and shows that so far as the operations of the company are concerned, deficits from all operations are commonplace in years of peacetime economy, both freight and passenger service.

"Q. After eliminating non-operating income? A. After eliminating non-operating income, and so charging the operating income with the fixed and contingent charges, to which it goes."

Mr. Patterson: And then I asked that the questions be admitted to be true, and the answers, and so forth.

Then, there are two or three others, here, from another case, and that was a case where the Coast Line filed an application with the Florida Railroad and Public Utilities Commission, designated as Docket No. 1594, for authority to discontinue operation of trains No. 37 and 38, operating between Jacksonville and St. Petersburg, Florida, and that a hearing thereon was held in Leesburg, Florida, on February 17, 1948, resulting in an order of the Florida Railroad Commission denying such application. At said hearing, A. S. Trundle, Jr., testified on behalf of the Atlantic Coast Line that he was Comptroller of the Atlantic Coast Line, and that the attached copies are true and correct copies of exhibit No. 7 filed by him at that hearing, and that they were prepared under the supervision of Mr. Ormond, who is Assistant Vice President of the Railroad, and by Mr. Ormond, Mr. Trundle and Mr. Anderson, Assistant Comptroller. In response to the question of the Chairman of the Commission, the witness testified as follows:

"(a) This exhibit shows the financial position of the Atlantic Coast Line as a System, and is submitted to point out

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that the result of our operation, our current operation, makes it necessary that every effort be made to discontinue unprofitable or obsolete service, particularly where there is still service left on the line for which request is made for the discontinuance of any train service. Sheet 1 is submitted merely as figures in that it is past history. It covers the ten year period, 1936 to 1945, inclusive, broken down into two five year groups. It shows our total investment and transportation property in the first column, less depreciation in the second column."

"(b) It then shows condensed railway operating income and the rate of return. I will call particular attention to the fact that for the five years preceding the war, 1936 to 1940, our rate of return on our total investment was only 1.24 percent. After deducting recorded depreciation, it was 1.21 percent. During the war years, the average for the five year period, 1941-1945, on total investment, it was 3.99 percent, and, after deducting depreciation, it was 4.66 percent. Even in the war years the rate of return is less than the normal rate of 5.75 per cent with—which the railroad believes is necessary to keep up its operations and provide full and efficient service.

"(c) For the year 1947, the rate of return on our gross investment was .77 and less recorded depreciation, .79 percent. On the basis of adjusted net railway operating income, these percentages were .51 and .65 percent. On either of the bases mentioned, our rate of return for 1947 was less than one percent. I think it might be appropriate to say that while these are system figures, it is known that the Atlantic Coast Line operations—operates a third of its mileage in the State of Florida."

The Court: You are speaking, or, is he speaking of the whole system now?

Mr. Patterson: The whole system.

Mr. Patterson: I continue.

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"(d) Q. The purpose of page 3, isn't it to show that excepting for the war years, that the passenger service has always been operated at a loss? A. That is correct, and I am carrying that forward into the last page to show that we had gotten back to normal business in 1946.

"(e) Sheet 5 I believe gives the best over-all picture of the results of the operations of 1947—of the Atlantic Coast Line for the years 1946 and 1947, and shows why we cannot continue to operate an unprofitable service.

"(f) Q. The money that you made in the war years was in no small part due to the fact that you were not able to keep up your maintenance department? A. That is true. It is a sore subject to the railroad. We paid fairly high, or very high income taxes on earnings in the war, and those earnings were nullified because we could not keep up our property in line with the heavy use that was taking place. That was because we were not able to get either material or labor.

"(g) The third column of sheet 5 shows that on its own operation for the last two years, the Atlantic Coast Line has failed to meet its fixed charges. For the year 1946 for approximately two and a half million dollars, and for the year 1947, by approximately two million dollars. I think that clearly shows the apparent need of the management of the Atlantic Coast Line in taking every action possible to curtail expenses and eliminate service that is not paying its own direct out-of-pocket expenses.

"The next four columns of this statement cover our non-operating income items. The column headed "Total net credit", shows that for 1946 the Atlantic Coast Line had non-operating income of $4,485,223.00, and it was necessary to use more than half of this amount to make up the deficiency from our direct operations. For the year 1947 our total net credit for non-operating income was approximately seven million dollars, of which it is necessary to use

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approximately two million dollars to make up our deficiency from direct operations".

"(h) Q. A question was asked of Mr. Rush, I believe, of why Atlantic Coast Line did not pay its taxes in some counties prior to November 1st, in order to obtain the four percent discount. Do you know why that was done? A. It was not done because the Atlantic Coast Line did not have the available cash. It was done during the year 1946. In the war years, we did take advantage and prepay all of our Florida taxes."

Mr. Patterson: Now, this is by Mr. Pettijohn.

"By Mr. Pettijohn:

"Q. You said the Atlantic Coast Line did not have cash. A. Available for taxes.

"Q. You meant it was ear-marked for other purposes? A. That is true. In any corporation as large as the Atlantic Coast Line, it is for new equipment that we expect to get in the year 1948, so we cannot use all the cash that might be on hand. What I meant to say in answer to that, was, that we did not have cash available for this purpose in the month of November, 1947 to prepay Florida taxes.

"(i) We are engaged in re-laying our line with 132 pound rail, and we are putting in new creosoted ties and we are endeavoring to catch up some of the maintenance that occurred during the war years, which we were not permitted to make at that time. We are fast running out of money. We had to curtail that in the year 1947."

Mr. Patterson: If your Honor please, I have one other document. What time does your Honor wish to adjourn?

The Court: Five o'clock.

Mr. Patterson: Your Honor, I am read out. I would appreciate a ten minute recess if your Honor would indulge me.

The Court: My experience is, the only way to handle lawyers is to tire the lawyer out.

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Mr. Patterson: I have here a copy of the record, and Mr. Bourne, have you got a copy of this?

Mr. Bourne: Yes.

Mr. Patterson: I won't read it all. I will just pick out a few statements and try to shorten it up.

Now, on page 920——

Mr. Bourne: My pages do not run that way.

Mr. Patterson: It begins with page 918. You have a wrong copy.

Mr. Bourne: Excuse me. Yes.

Mr. Patterson: This was the testimony given by Mr. R. J. Doss, who was Vice President of the Atlantic Coast Line Railroad Company. I think he was Vice President in charge of traffic.

On page 920, this question was asked:

"Q. Please proceed with the statement which you have to make on behalf of the Atlantic Coast Line Railroad Company."

Mr. Patterson: This was a rate case in Washington.

"A. I have one exhibit consisting of seven sheets which I desire to place in evidence.

"The tremendous increase in cost of operation during the last eighteen months has been such that, even with the increase in freight charges authorized under Ex Parte 162, it has not been possible for the Coast Line to show a net railway operating income except by the drastic curtailment of our program for maintenance and rehabilitation. This is borne out by the figures shown on Sheet 2 of my exhibit, which indicates, for the first six months each of 1945, 1946 and 1947, the pertinent items as to railway operating revenues, railway operating expenses, and revenue results from operations.

"At line 18 it is indicated that for the first six months of 1947, the net railway operating income for the Coast Line was $3,008,846. At Line 7, there is shown as expended for maintenance of way and structures for the first six

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months of 1946, $16,329,638 and for the corresponding period of 1947, $13,796,290, a reduction in that expense of $2,533,348.00. Had we spent for maintenance of way and structures for the first six months of 1947, the same as was spent in the first six months of 1946, the net railway operating income would have been reduced to only $475,498; but, had we maintained that work in the same quantity as for the first six months of 1946, it is obvious that the increased cost of the material and supplies would have practically wiped out even that meagre return.

"At Line 8 of Sheet 2, there are shown the amounts paid for the first six months of the years 1945, 1946, and 1947 for maintenance of equipment. The expenditures for this account during the first six months of 1947 show an increase of $124,590 over that for the first six months of the year 1946, but a reduction of $3,030,082 from the expenditures for that account during the first six months of 1945."

Mr. Patterson: Now, Mr. Bourne, I will skip on over to page 922:

"This question of curtailment of or proceeding with the program of maintenance and rehabilitation is one of importance not only to the Coast Line, but to its patrons and the entire community which it serves."

To save time, I will skip down to the next paragraph.

"Prior to the Florida boom in the mid 1920's, the Coast Line had pursued a reasonably regular policy of adding to its equipment and of strengthening and modernizing its railroad facilities. During the Florida boom period with its greatly expanded business volume, additional equipment had to be acquired to handle that increased volume, and some of that equipment became surplus in the depression years following the boom. That was also true with respect to railroad facilities as intensive attention was given that feature during the Florida boom days, but curtailment in maintenance activities had to be effected during the depression years of reduced volume and earnings.

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"Following extensive purchases of additional power and additional equipment in the mid 1920's, no new power or equipment was purchased from 1926 to 1939, excepting for a relatively small number of units of steam locomotives, of passenger cars and of box cars in 1938. The Coast Line approached the recent war years with an unbalanced modern power and equipment situation, and power and equipment ownership inadequate to take care of normal traffic and therefore, greatly inadequate to take care of the then unforeseen war traffic.

"In 1939 an aggressive equipment program designed to restore equipment and power ownership to that necessary to meet normal demands, but without thought of the burden of war traffic, was undertaken. Since the latter part of that year, the Coast Line has acquired fifty three Diesel passenger units, thirty-six Diesel freight units, thirty-four Diesel switching units, fifty-two light-weight passenger cars, and 11,776 freight cars. The new equipment added to ownership since 1939 includes only a relatively small number of modern passenger cars."

Now, on page 924, without reading all of this——

"The Coast Line, like most of the other railroads in the country, is being urged to acquire a substantial number of additional boxcars to add to the pool for national requirements. In July of this year, our Board of Directors authorized inquiries for bids for construction of four thousand new freight train cars as follows:

"2,500 forty-foot six inch box cars; 500 each, high side gondolas, and hopper bottom coal cars, and 100 each low side mill type gondolas, flat cars, pulpwood cars, port phosphate rock cars and cement hopper cars. The estimated cost of these four thousand freight train cars is $15,175,000. Additionally, orders have recently been placed for fifty new express refrigerator cars at an estimated cost of $750,000."

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Mr. Patterson: Now, page 925, Mr. Bourne:

"The rehabilitation of existing equipment in our own shops has been seriously curtailed by our having been forced to reduce shop forces, commencing in the month of May, 1946, in an effort to meet the increased cost of operation and the reduced operating income. These forces were reinstated partially during the winter months account of seasonal business; however, we have been compelled to again make retrenchments on account of increasing operating costs and reduced income. Comparison of man-hours worked by our present force and the force employed in April, 1946, reflects a decrease of 20.13 percent.

"The present force is inadequate for the restoration of the equipment as required, due to the run-out miles, and by the end of the year 1947, it is anticipated that with the reduced force there will be an under-maintenance in the neighborhood of 100 steam locomotives; 87 passenger train cars and 2,000 freight train cars."

Mr. Patterson: Now, on page 927. Mr. Bourne, would you mind me trying to summarize this?

Mr. Bourne: I would rather you did not. I may want to read back the part you skipped.

Mr. Patterson: I do not mind putting the whole thing in if you want.

Mr. Bourne: I would prefer it.

Mr. Patterson: I have no objection to it.

The Court: If you introduce it in evidence, you are entitled to put in what you want to put in.

Mr. Patterson: The latter part is not pertinent to it at all. I think I will be through in about five or six more places, your Honor.

Page 927. "It will be noted that during the five year period 1933 to 1937 inclusive, the average yearly applications were only 34 track-miles of new rail laid, 1,177,000 cross ties, and 165,000 cubic yards of ballast placed in tracks. Then in the next succeeding five year period, 1938

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to 1942, inclusive, the yearly averages were only 63 track miles of 100 pound new rail laid, 904,000 cross ties, and 140,000 cubic yards of ballast placed in tracks. It was this meagre installation of rail, cross ties and ballast during the ten year period to 1943 which made it necessary to inaugurate in that year, an extensive program of strengthening the track structure."

I read from page 928. After referring to difficulties in getting materials and rail, he says: "However, the materially increased costs of operation, coupled with the large decline in revenue, made necessary a substantial deceleration in the progress of that program, it having been found necessary to reduce roadway forces, extra gangs and section gangs by 1,100 employees on July 1, 1946. Again, on August 1, 1947, a further reduction of approximately 5 percent became an economic necessity."

Then he refers to the fact that they had employed outside contractors because they could not get labor and tools. The third from the bottom line.

"The same situation which forced reduction in our roadway forces necessitated the discontinuance of the vast majority of this contract work about August 15, 1946, and the remainder August 1, 1947".

Then he refers to the order of the Commission requiring them to install a block system——

Mr. Bourne: Mr. Patterson, it is going to be awfully hard for me to pick up what I want to read if you paraphrase.

Mr. Patterson: I am trying to make out the background so as to pick out part of it without reading the whole thing. He says the expenditure of eleven million dollars was called for for the construction of this modern signal system. That is all I wanted to state, there.

Now, page 930:

"As to this latter part of the order, we expect that, as our rehabilitation program is completed and extended to

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additional secondary main lines, we will desire in the interest of better service to the public to increase the speed of our trains operating on such secondary main lines to sixty miles or more per hour. Compliance with this order as to such additional secondary main lines as are likely to be so treated is estimated to cost an additional $6,800,000. resulting in a total of $17,800,000. for signal installation under this order."

Now, page 931.

"Now, as bearing on the use which was made by the Coast Line of the income derived during the period of high earnings because of war conditions, I would refer to sheet 5 of my exhibit which shows that during the four year period from January 1, 1942, through December 31, 1945, the Coast Line charged to operating expenses for amortization of defense projects, a total of $37,248,674, and during ing the same period made cash expenditures on account of equipment in the amount of $29,326,992.

"During the war years, Coast Line, like most of the other railroads, had high net income even after payment of extremely heavy income taxes. This apparently large income was accounted for, in part, by insufficient charges from maintenance accounts because of our inability to obtain sufficient materials and labor to overcome the wearing out of the property by the unprecedented heavy usage during the war years."

Page 934:

"Particular attention is directed to the expenses for the items of maintenance of way and structures and for maintenance of equipment. Our estimate is that for the year 1948 the expenditures for maintenance of way and structures will be $30,149,471, should the present level of freight rates continue in effect, but will be increased to $36,195,438 should we obtain the full measure of the increases sought under Ex Parte 166. For maintenance of

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equipment, it is estimated that we will spend, in the year 1948, $25,661,908 should present level of rates and charges remain in effect, but that that item will be increased to $29,094,774 should the full measure of the increases sought in Ex Parte 166 be granted. It should be noted that for these two items the difference amounts to $9,478,833.

"Summing up, the Coast Line's program for the additions to its rolling stock contemplate an expenditure of approximately $24,425,000 in the near future, and its program for extension of its signal installation calls eventually for expenditure of approximately $18,588,000, these two items totaling $45,013,000."

On top of page 935, he says:

"The principal and practically the only source from which we can look to obtain sufficiently increased revenues for such necessary purchases is in the rates assessed for handling freight."

At the bottom of page 937:

"A. The Coast Line's net railway operating income in June, 1947, was $29,000. In July, 1947, there was a deficit of $334,000. And an expected deficit in an amount not yet known for August.

"Q. What have you to say as to the actual net railway operating income of the Coast Line for the first six months of 1947? A. Sheet 2 of my Exhibit 15 shows the actual railway net operating income of the Coast Line for the first six months of 1947 was $3,008,846".

Mr. Patterson: That completes that portion that I wanted to read.

The Court: All right, we will give you a rest, Mr. Patterson. What is the usual time to convene court here?

The Marshall: Ten o'clock.

The Court: Does ten o'clock suit everybody?

Mr. Patterson: It is agreeable with me.

Mr. Byrnes: I think ten o'clock would be all right.

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Mr. Allam: I would personally prefer 9:30.

The Court: So do I. Well, we will make it ten o'clock.

The Court: I want some of you to find the charter of this Florida East Coast Railway Company and see whether it is a special act or what it is.

Mr. Frink: We will be glad to have a copy of it for you, your Honor.

. . . And thereupon Court adjourned to be reconvened at ten o'clock in the forenoon, Tuesday, January 11, 1949.

. . . And at ten o'clock in the forenoon, Tuesday, January 11, 1949, Court reconvened pursuant to adjournment of the preceding day, and the following further proceedings were had.

The Court: Have your seats. Gentlemen, I have two or three matters here that I will get off of my mind and on to yours.

There is a letter here from the Union of Red Caps and Train Porters, calling attention to the fact that they have a contract with the Florida East Coast Railroad Company, and they do not want anything done to impair it. And they want this filed of record, and I will hand it to the Clerk and let him put it among the papers. It will be here if you care to look at it.

I have also, here, handed me by Mr. Frank, the application on the part of the Trustees to purchase new rails to the extent of a million and a half dollars in the current year, and of which due notice, he says, has been given and published, and he has presented an order which he says is in the usual form, authorizing this purchase.

He says he is not informed of any objection to it, and I thought I would bring it up and get it out of the way, if there is.

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. . . To which inquiry there was no response.

The Court: The order seems to take care of the situation and all contingencies that could happen about this rail. What would become of it and how the money that went into it would be dealt with. It is all held for future consideration.

Mr. Patterson: If your Honor please, I do not have a copy of that order.

Mr. Frink: I have one for you, Mr. Patterson.

The Court: I presume this is a part of the improvement that has been going on, on the railroad. Buying new rails and re-laying forty miles of new rail.

Mr. Patterson: That is right, your Honor.

The Court: In preparing these orders, I would be glad if you would designate me, to save me writing a little bit, "District Judge Designate", and, I would like to keep my business clear.

There is one other thing I want, Mr. Patterson, too, not that I do not work myself just as hard as I do him. I took with me last night the record of the Reporter about these alleged free assets and I read the two hundred pages and looked over the exhibits, and I am up to date on that. That is a mere matter of information and I turned the record back to the Reporter, and if any of you gentlemen want to sit up at night with it, all right.

Now, we will return to the regular order, and I believe Mr. Patterson has the floor.

Mr. Bourne: Your Honor, I would like to present a preliminary matter and I think it would save time.

The Court: All right.

Mr. Bourne: We took Mr. Ball's deposition early in November. At that time he was requested to produce a number of documents. The people who had them in their possession were out of town and for other reasons, it was not physically possible for them to be produced, and Mr. Patterson said he would examine them and he would let

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me have such of the missing papers that he thought I should be permitted to have, and, cooperate with me. I did not hear from him for quite a long time, and I wrote him and reminded him of his commitment, and on the 14th of December, he wrote a letter saying he had examined them and he did not think any of them were pertinent, but that he would have them in Court at this hearing. I then sent, on December 24, a list taken from the transcript of the record, of what they were, and asked if he would have them in Court, in order that we may get a ruling from your Honor.

I had a subsequent letter which seemed to me to leave the matter in some confusion, to which I replied saying I would request production of the various documents; and I would like now to have a ruling on this, if I may. It is really a continuation of the taking of the deposition. It was impractical to get a ruling before, because of Judge Strum's illness, and because of our understanding that Judge DeVane was not taking any part in it at all. Bringing it up now, I would have a chance to look at the documents before we go on with our case, and, it would not delay things.

The Court: What about it, Mr. Patterson?

Mr. Patterson: If your Honor please, I do not have those documents with me in Court this morning. Our position is, those documents are not material to the case and have no bearing upon the issues here. Do I understand, Mr. Bourne, you are going to introduce the deposition?

Mr. Bourne: I do not make any commitment about that. I am in position——

The Court: The documents are here, Mr. Bourne, and when you come around to introducing evidence and offering them in Court, we will take that up then.

Mr. Bourne: I have not seen them yet.

The Court: You just had a gentleman's agreement with him. He said he would have them here and he will.

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Mr. Bourne: My supposition was I would obtain a ruling that I would be permitted to see them. I have not been permitted to see them. I think I may freely ask for an opportunity to examine them before I undertake to clutter up the record.

The Court: I presume I will have to see them then, and you will, too, to know if they have any bearing.

Mr. Bourne: Wouldn't it expedite matters if they could be produced early in the hearing?

The Court: I do not know; Can you have them here tomorrow?

Mr. Patterson: Yes, sir. I think I could have them available this afternoon. But, I do think that inasmuch as this is a trial and not a deposition, that the documents should be presented to your Honor in view of my objection.

The Court: There has not been an order from the Court requiring them to be produced?

Mr. Patterson: No, sir.

The Court: Mr. Patterson, you said you would . That is what I referred to when I said, "A gentleman's agreement." There has been no formal order.

Mr. Patterson: All right.

Mr. Alderman: May it please the Court, on yesterday when I noted the appearances on behalf of the Intervenors, Southern Railway System Lines, I failed to note the appearance of our Jacksonville counsel, Mr. C. C. Copp, and I would like to do so now.

The Court: All right.

Mr. Patterson: I have a witness I would like to call. Mr. Veale.

Mr. Bourne: May I ask one other question, your Honor. I have a very small excerpt from the testimony of Mr. Doss, parts of which were read by Mr. Patterson. Should that be read by me now in the nature of cross examination of Mr. Doss, or, await the presentation of my case.

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The Court: I do not know that it makes any difference. It is a matter of convenience. I think you should offer the balance of it as your evidence. The documents.

Mr. Bourne: I will do that.

Mr. C. W. VEALE, having been produced and first duly sworn as a witness on behalf of the Objector, St. Joe Paper Company, testified as follows:

Direct examination by Mr. Patterson:

Q. Mr. Veale, what is your name? A. C. W. Veale.

Q. Mr. Veale, where do you live? A. Waycross, Georgia.

Q. What company do you work for? A. Atlantic Coast Line Railroad Company.

Q. What poistion do you hold? A. Acting Superintendent of the Waycross District.

The Court: I did not understand you.

A. Acting Superintendent of the Waycross District, your Honor.

By Mr. Patterson:

Q. How much territory does that district cover? A. In mileage?

Q. No, just generally, in territory. Just a general outline. A. From Savannah to Jacksonville; from Waycross to Thomasville; from Thomasville to Albany; Albany to Brunswick, and duPont to High Springs and Lake City Junction to Lake City.

Q. Were you acting in that capacity in July, 1942?——

Mr. Bourne: 1948.

Mr. Patterson: 1948, I mean.

A. Yes, sir.

Q. I hand you photostatic copy of a document and ask you if you recognize that document. A. Yes, sir.

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Q. That signature was put on it with your authority? A. No, sir.

Q. Was it issued cut of your office? A. It presumably was, yes, sir.

Q. Do you know anything about it? A. No, sir.

Q. You don't know whether it was sent out or not? A. No, sir—well, it was posted on the bulletin board, I understand.

Q. It was posted on the bulletin board? A. Yes, sir.

Q. Do you recognize that document? A. Yes, sir.

Q. Do you make the same statement with reference to that? A. Yes, sir.

Q. Do you know whether any complaints were made about that, to your office? A. No, sir. Not to my recollection, sir.

Q. Do you know anything about any order revoking that? A. I know, verbally, is all.

Q. You did not issue an order revoking it? A. No, sir.

Q. Did you receive any instructions from the management with reference to it? A. No, sir.

Q. You don't know of any order made by the Interstate Commerce Commission in reference to it? A. No, sir.

Q. But, you never revoked these documents? A. Personally, no, sir.

Q. Who was it done by? A. The Car Distributor generally handles such a matter.

Q. So, this was the Car Distributor in your office that issued these? A. Yes, sir.

Q. Your initials are C. W.? C. W. Veale? A. Yes, sir.

Mr. Patterson: If your Honor please, I would like to offer these documents in evidence. Here they are, Mr. Bourne.

Mr. Bourne: Your Honor, I object on the ground that they are incompetent, irrelevant and immaterial.

Mr. Patterson: Your Honor, they are a little dim. I hope you will be able to read them. The large one is the first one, and the smaller one is the second one. (Tendering documents to the Court.)

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The Court: Well, I guess I ought to ask what your idea is about it, Mr. Patterson. I can see what it says, of course.

Mr. Patterson: If your Honor please, in the Commission's report the emphasis was laid on what they referred to in one place as the fitness of St. Joe Paper Company to control it. There are repeated statements to the fact, either directly or by inference, the fact that the Coast Line would be more transportation minded and would not be disposed to discriminate against shippers. This testimony—you will note the dates there—occurred after——

The Court: Well, it looks like a discrimination against the consignee.

Mr. Patterson: Yes, sir, and it directly affected, in a material manner, the consignors. Because, a rack car can be loaded in a fraction of the time it takes to load an ordinary box car. But, the letters speak for themselves.

The Court: I do not know what the reasons were for it. It looks like we are getting off into trying a matter that the Interstate Commerce Commission has jurisdiction of to correct.

Mr. Bourne: And, it has been corrected. I think Mr. Patterson will stipulate that.

Mr. Patterson: I was going to ask you if you will admit that the Interstate Commerce Commission ordered them to desist at that time.

Mr. Bourne: We certainly will concede it.

The Court: Of course there is some question as to what started this thing, and why. It looks a little bit bad on the face of it.

Mr. Bourne: That is the basis for my objection, your Honor. That is, in order to trace the history of this particular episode, which we concede was a mistake on the part of the car distributor, we have to have a *de novo* trial here about a matter——

The Court: Well, I believe I will let you have the trial and see what it brings forth.

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Mr. Patterson: I do not know that I exactly understand, your Honor.

The Court: I am overruling the objection.

. . . The instruments last above referred to were received and filed in evidence and marked Objector's, St. Joe Paper Company's Exhibits Nos. 3 and 4.

Mr. Patterson: That is all the questions I will ask.

Cross examination by Mr. Bourne:

Q. Mr. Veale, do you know whether, prior to the issuance by the car distributor of the order or direction which has been marked as an exhibit, there had been complaints by the Brunswick Pulp & Paper Company that the St. Joe Paper Company was getting far more of these cars than was its share? A. Yes, sir.

Q. Do you know whether there were any discussions as to the method, the practical method of handling that type of situation?

Mr. Patterson: I object to that, as to the discussion. It is too general a question.

Mr. Bourne: It is preliminary. I will ask who was in the discussion.

Mr. Patterson: All right, with whom.

Mr. Bourne: I never saw this witness until five minutes ago.

The Court: It would look like, for the purposes of this hearing, that what the Waycross Division sought, here, was not necessarily that the management was in fault. The attitude of those who made it, seems to be a point of the explanation, too. Go ahead.

By Mr. Bourne:

Q. Do you know whether there were any discussions in your office in which you participated, with respect to the practical method of eliminating a claim of the Brunswick

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Pulp & Paper Company that there was a discrimination in favor of St. Joe Paper Company? A. Merely conversation between myself and the car distributor. When I heard of this complaint I asked him——

Q. Well, no, I meant to address myself to discussions that preceded the order. You are starting to talk about discussions that took place after the order. A. No, sir, I do not.

Mr. Bourne: That is all.

By the Court:

Q. Mr. Veale, these were on the bulletin boards and you saw them there? A. No, sir, I did not see it, your Honor.

Q. You did not? Excuse me. What do you know about it? Who had it done? Do you know that? A. The instructions have always been issued—have always been understood to give each mill its proportion of the equipment, sir. And, the car distributor was trying to maintain that proportion.

Q. You think the car distributor, then, is the one who put this in force? A. Yes, sir. He did that in his attempt to give each mill their proper proportion of the equipment.

Q. As far as you know, the central management did not know of it and had nothing to do with it? A. No, sir.

By Mr. Bourne:

Q. Mr. Veale, would you say, if you can, who would be the officers in the central management who would know about it, if anybody did know about it? What I want you to give me is just the set-up of the Atlantic Coast Line. A. The General Superintendent of Transportation.

Q. What is his name? A. Mr. L. T. Andrews.

Q. And who else? A. Mr. H. M. Kendall.

Q. And who is superior to Mr. Andrews? A. The General Manager, L. S. Jeffords.

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Q. And who is superior to Mr. Jeffords? A. Mr. Champion McDowell Davis.

Q. Mr. Jeffords reports directly to Mr. Davis? A. Presumably so, sir. I don't know.

Mr. Bourne: Thank you.

Re-direct examination by Mr. Patterson:

Q. Mr. Veale? A. Yes, sir.

Q. These letters are dated July 20 and July 24. When was the correction made of that——

The Court: 1948?

By Mr. Patterson: 1948. When was that order corrected or nullified?

A. I can't tell you, sir.

Q. You didn't follow through or have any supervision over this order? A. No, sir. Not personally.

Q. When did you first know about it? A. I was traveling over the Albany branch and the agent at Baconton, Georgia, called it to my attention.

Q. What month was that in? A. I can't tell you that, sir.

Q. Did you report these facts to your superior officer? A. When I went to the office I mentioned it to my chief clerk and was told by him the car distributor had cancelled the orders that date.

Q. Well, do you mean to say—well, what date was that, approximately? A. I can't tell you, and, I don't recall.

Q. You don't remember what month it was? A. No, sir.

Q. You say this order was made to effect a more equal distribution of cars. A. That's the explanation the car distributor gave me, yes, sir.

Q. You know, as a matter of fact, however, that this order prohibits the use of any cars by St. Joe Paper Company, do you not? A. No, sir.

Q. It did not read it? (Tendering witness exhibit.) A. I would understand, sir, that boxes, vents, or—boxes or vents could be loaded.

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Q. No rack cars, though? A. No, sir.

Q. And there is a material difference to shippers, particularly in loading a rack car or betweeen loading a rack car and loading a box car? A. Yes, sir.

Q. In the matter of cost as well as time? A. Yes, sir.

Q. Now, did you not report this to your superior officers? A. No, sir. As I just stated, when I returned to my office, my chief clerk remarked that the car distributor had cancelled it.

Q. Did you notify the Interstate Commerce Commission that it had been cancelled? A. No, sir. I had no knowledge of that.

Q. Did you get a copy of the letter of the Interstate Commerce Commission to Mr. Jeffords, dated—just a minute, I will give you the date. Dated September 27, 1948?

Mr. Bourne: Letter to Mr. Jeffords or from Mr. Jeffords?

Mr. Patterson: Letter to Mr. Jeffords from the Interstate Commerce Commission.

By Mr. Patterson:

Q. Did you see a copy of that letter? A. Not that I recall, sir, without seeing the letter to which you refer.

Q. (Tendering paper) September 23rd. That is it right there. A. (Examining letter) I have seen a copy of that, sir.

Q. You have seen a copy of it? A. Yes, sir.

Q. Did you see a copy of this letter from Mr. Jeffords to the Interstate Commerce Commission (Tendering witness exhibit)? A. (Examining letter) Yes, sir, I have seen a copy of that, sir.

Mr. Patterson: I would like to offer these two letters in evidence. The correspondence between the Interstate Commerce Commission and the Atlantic Coast Line, showing the correction to which Mr. Bourne referred.

Mr. Bourne: I have no objection to this letter from the Commission. It is on the Commission's letterhead.

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. . . The instrument last above referred to was received and filed in evidence and marked Objector, St. Joe Paper Company's Exhibit No. 5.

Mr. Bourne: I have no objection to this one, either.

Mr. Patterson: If your Honor please, I would like to attach these, and I will ask the Clerk just to hand them up. They are merely information only, and have no particular importance, otherwise, except to show the dates on which it was corrected.

Mr. Patterson: That is all I have, if your Honor please.

Mr. Bourne: That is all I have.

Mr. Patterson: Come down, Mr. Veale.

(Witness excused)

Mr. Patterson: If your Honor please, I now offer certified copy of the report of the Atlantic Coast Line to the Interstate Commerce Commission for the month of October, 1948, monthly report of selected income and balance sheet items, to which is attached the certificate of Mr. W. P. Bartel, Secretary of the Interstate Commerce Commission.

Mr. Bourne: I have no objection to this, your Honor. I do not have a copy of it. I would like to have one.

Mr. Patterson: I do not have an extra copy, otherwise I would be glad to give you one. I will be glad to have my stenographer make a copy.

Mr. Bourne: I will appreciate it if you will.

. . . The instrument last above referred to was received and filed in evidence and marked Objector, St. Joe Paper Company's Exhibit No. 6.

Mr. Patterson: That is all the evidence we will have, your Honor.

The Court: Let me see what the point is in that exhibit, Mr. Clerk.

Mr. Bourne: Mr. Patterson, what is the date of Mr. Jefford's letter to the Interstate Commerce Commission?

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The Court: I can see where it might have a bearing on it.

Mr. Patterson: Yes, sir, it has a very considerable bearing; it will have a considerable bearing on some of our argument.

Mr. Bourne: Could I suspend a minute and see if I can get a copy?

Mr. Patterson: You can use it for the time being. This one.

The Court: You can use it. It is here in Court. You can use it the same as anybody else.

The Court: All right, Mr. Milam, now what do you wish to say?

Mr. Milam: Your Honor——

The Court: Who do you represent? I am a little confused.

Mr. Milam: S. A. Lynch Interests, holders of the First and Refunding Bonds. I wish to call Mr. Gordon.

Mr. William A. Gordon, having been produced and first duly sworn as a witness on behalf of the Objector, S. A. Lynch Interests, testified as follows:

Direct examination by Mr. Milam:

Q. State your name and address. A. William A. Gordon, and I reside in Darien, Connecticut.

Q. What is your business, Mr. Gordon? A. I am a partner in the consulting engineering firm of Coverdale & Colpitts, with offices at 20 Wall Street, New York City.

Q. What is your education? A. I was graduated from Harvard University in 1916 with an A. B. degree.

Q. Will you state to the Court, your experience, particularly in the end with respect to railroad reorganizations? A. During the summers, while I was in college, I worked in station and yard service for the New Haven Railroad.

Following graduation, I was employed for nearly fourteen years continuously with the New Haven Railroad in

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the operating and accounting departments, with the exception of nearly a year and a half when I went away, serving in the Army during World War One.

During the last, about seven years of my work with the New Haven, I was principally engaged in making special studies involving traffic and revenue surveys and cost studies and various other operating problems.

My work at that time also consisting of preparing testimony and exhibits in connection with rate and divisional cases before the Interstate Commerce Commission and other regulatory bodies.

For several years prior to leaving the New Haven, I was special assistant to the Comptroller.

About the middle of 1930——

The Court: What Comptroller? The Comptroller of the railroad?

A. That's right. I left the New Haven about the middle of 1930 and accepted a position on the staff of Coverdale and Colpitts, consulting engineers. I have been associated with that firm continuously since that time with the exception of one year and a half when I obtained leave of absence to serve overseas with the Lend-Lease Administration during World War II.

I might say that while I was overseas with the Lend-Lease Administration, although my work was not confined entirely to railroad work, I did some work in checking the material requirements, particularly with respect to critical materials of the Iraqi National Railroad, and the Egyptian National Railroad.

My work with Coverdale & Colpitts has been usually in the transportation field, and largely in connection with railroads, although I have also made some surveys and reports in connection with air lines, bus lines and inland waterway carriers.

My work with Coverdale & Colpitts has involved a good many railroads in various parts of the country. Some of these assignments involved operating problems, post-traf-

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fic analyses, and tax cases. Proposed consolidations and reorganizations. The reorganization studies usually included studies of mortgages, with earnings, traffic and revenue forecasts, operating efficiency, future capital requirements and other matters.

The reorganization cases in which I have taken part are as follows:

The Chicago & North Western; Milwaukee; Soo Line; Central of Georgia; Rock Island; Missouri Pacific; Denver & Rio Grande Western; Alton; Central of New Jersey; St. Louis & San Francisco, and the Florida East Coast.

I might say that in two or three of those I did not take part, an active part in the hearings, but made surveys, preliminary surveys, which were used by the Bondholders Committees in connection with the reorganization.

By Mr. Milam:

Q. Then you have, both in the railroad field and industrial field, made surveys and studies such as you have outlined? A. Yes, that is true. I might also add that in connection with the industrial studies that in 1945 our firm made a study of the—a port survey and industrial survey of Jacksonville. I was in charge of that study, also.

Q. And you performed that work for the firm? A. That's right.

Q. Did the firm have any prior connection with the Florida East Coast Railway, or, its reorganization? A. Not with the railway itself, but in 1936, I think that was the first time that our firm had any connection with the reorganization problems, and we made a study to determine the effect of the abandonment of the Key West Extension. That work was done jointly for the Trustees of the First Mortgage Bonds and the Trustees of the First & Refunding Bonds. I did not personally take part in that study.

From 1939 on, our firm has been employed at various times by groups of the First & Refunding Bondholders to advise them regarding various reorganization problems.

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Mr. Miles C. Kennedy, one of my partners, testified at the reorganization hearings before the Interstate Commerce Commission on October 24, 1940, and again on May 3, 1944. Then, on October 2nd, 1945, our firm was retained by the S. A. Lynch Group of First and Refunding Bondholders, and as a result of that engagement, I prepared testimony and exhibits and testified before the Interstate Commerce Commission on November 19, 1945.

Q. Have you, Mr. Gordon, been recently employed by the Lynch Interests to make a further study and investigation? A. Yes, I have.

Q. Outline briefly, the nature of the study you made. A. Our present engagement is primarily for the purpose of making an up-to-date estimate of the earning power of the Florida East Coast.

Since the last hearing before the Interstate Commerce Commission in 1945, we have had the experience of post-war years. Three post-war years with post-war conditions and traffic. And our principal assignment was to make a study of the post-war traffic and economic conditions and a forecast of the earning power of the Florida East Coast in the future.

Q. Now, what factors did you study? What did you do? Outline, generally, to the Court. A. We analyzed the traffic movement of the Florida East Coast Railway with respect to traffic originating on the line and traffic terminating on the line.

We also included in our analysis, the passenger business.

In addition, we made analyses and comparison of the economic situation generally, and wherever possible, in the counties served by the Florida East Coast Railway, with respect to the agricultural situation. With respect to what you might call the consumers market, and with respect to business and industrial conditions generally. I think that sums up pretty well what our studies covered.

Q. Did you study the economic factors existing in the post-war period? A. Yes, sir.

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Q. Did you make a study of the growth factors? A. Yes, sir.

Q. Was there any limitation upon your investigation, or were you to make a complete analysis for a report to the Court? A. There was no limitation. I mean, the commitment was to study the post-war conditions with respect to the future of the Florida East Coast Railway.

In addition to that, there were certain other items which we were requested to prepare testimony and exhibits on. But, as far as any restriction, we were not given any specific instruction as to what factors to select, and the selection of the factors was made by me.

Q. Is that the business of Coverdale & Colpitts, of which you are a partner? To make such investigations? A. That's one of the many kinds of business of the firm.

Q. Well, it does a great deal of that kind of work? A. We have done a great deal of that kind of work in the past.

Q. Did you prepare certain exhibits reflecting the results of your investigation? A. Yes, sir.

Mr. Milan: Your Honor, copies of those exhibits have been circulated yesterday.

By Mr. Milam:

Q. Will you state the first exhibit in the order that you have arranged them?

Mr. Bourne: Will you read the date? We haven't got them in the same order.

Mr. Milan: All right, read them. You did have them in the same order to start with.

Mr. Bourne: All right.

A. The first exhibit is entiled "Florida East Coast Railway Company, Cash Expenditures for Additions and Betterments and Accompanying Net Charges to Operating Expenses, 1941 to 1948, inclusive".

That statement shows a total of $9,363,824.00, cash expended for additions and betterments, and $4,297,138.00,

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cash chargeable to operating expenses, making a total of $13,660,962.

Q. Now, that was over—go ahead, sir. A. The sources of the information are shown in the right-hand column, and the items marked, "Trustees' Statement No. 1 of September 18, 1948, and Trustees' Statement No. 3 and No. 6, of September 18, 1948," were introduced by Mr. Patterson yesterday.

I might say that these classifications, by use of the general additions and betterments, are for the authorization dates. In other words, those are the authorizations made for the years 1941 to 1946, so that the total of $13,660,962, is somewhat under-stated because it does not have the authorizations for the years 1947 and 1948, to the extent that money was spent in connection with those authorizations.

One other comment in connection with the rail program. The Miles of main track which have been re-laid up to 1948, 472 miles, the last six months of 1948, were based on the Trustees' estimates.

Q. Mr. Gordon, did you work closely with the Trustees in the compilation of this information? A. Not exactly, Mr. Milam. All of the information is taken from the data furnished—either furnished us by the Trustees or contained in the statement offered as exhibits by Mr. Patterson yesterday, with the exception of one figure which was taken from the Florida East Coast Annual Report to the stockholders for the year 1947. But, we did not submit the exhibit as due to the Trustees.

Q. All right. One other question. Apparently, on the rail program, over four million was charged to operating expense, and a million and a quarter to additions and betterments, or capital expense? A. That is correct.

Q. Will you explain to the Court just how that arose? What is the situation? A. Well, the Interstate Commerce Commission rules with respect to that provide that when rail is laid in replacement, that the cost of the heavier weight, only, is charged to capital. In other words, if ninety

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pound rail is being replaced by one hundred and twelve pound rail, the price of the new ninety pound rail would be charged to operating expenses and only the additional weight would be capitalized.

Q. How about all of the expense of ties and re-laying and all of that? A. Well, those expenses would go into the ordinary operating expenses.

Q. I see. Is the whole main line of the Florida East Coast Railway being relaid with heavier rail? A. That is my understanding. That is the program.

Q. Getting it squarely before the Court, if ninety pound rail is replaced by a hundred and twelve pound rail, is 22/112 of the cost of the new rail only to be charged to capital expense? A. I think that's right. I think there may be some technical difference, but, roughly, that is correct.

Q. It is also true that the salvage out of the rail replaced, is credited to operating expense, is it not? A. Yes, sir.

Q. Then, this figure of the difference between the rail program, charged to operating expense of four million dollars, and a million two hundred sixty five thousand charged to capital expense, represents that method of accounting? A. Yes, that is right.

> Mr. Milam: That exhibit is offered in evidence. . . . There being no objection, the instrument last above referred to was received and filed in evidence and marked Objector, S. A. Lynch Interests' Exhibit No. 1.

By Mr. Milam:

Q. What was the next schedule that you prepared, Mr. Gordon? A. The next statement is headed "Revenue Tonnage Comparisons, F. E. C. Railway versus U. S., Southern, Florida and Competing Railroads, 1940 and 1947".

The exhibit shows comparison of the tonnage originating on line, terminating on line and total tonnage carried.

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Q. What do you mean by "Revenue Tonnage Comparisons"? A. Well, the term means the freight tonnage handled by the railroad, excluding other revenue tonnage. In other words, excluding tonnage which is handled for the company's own use.

Q. Such as ties and things like that? A. Company material.

The Court: These figures have no dollar mark on them?

A. No. They have tonnage. Expressed in thousands. You will notice, your Honor, the first sub-caption, "Tonnage originated on line (000)", on there is expressed in thousands of tons.

By Mr. Milam:

Q. Now, for the Court's information, state generally what is shown by this exhibit. A. I think I should explain first what the reason was, why I selected the year 1940 and the reason for doing that was that at the time that the Interstate Commerce Commission made its Plan and estimated the Florida East Coast earning power at $1,268,000 available for charges, they based that on primarily, as I understand it, on estimates made by the Receivers of the Florida East Coast prospective traffic. That estimate was made in early 1941 and the latest year's available to the Receivers at that time, and to the Commission when they held the hearing, was the year 1940. So, for that reason I felt that it was proper to use that, and since it was the last full calendar year at the time the previous forecast was made.

The year 1947 is used as it is the last full calendar year available at this time.

The figures, I think, speak for themselves, and show in all three categories—that is, originated on line, terminated on line, and total tons carried—That the Florida East Coast Railway has had a very much greater increase in freight traffic than either of the principal competing railroads in Florida. Greater than the State of Florida as a whole, excluding the F. E. C. Greater than all roads in the South-

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ern Region, and greater than all Class I railroads in the United States.

Q. The last column expresses that increase of each railroad in percentages, does it not? A. Yes, sir.

Q. And you got all of this information from the Interstate Commerce Commission report? A. That is right.

Mr. Milam: That exhibit is offered in evidence.

> . . . The instrument last above referred to was received and filed in evidence and marked Objector, S. A. Lynch Interests' Exhibit No. 2.

By Mr. Milam:

Q. The nature of the next exhibit, and comment upon it. A. The next exhibit is headed, "Freight Revenue—Comparisons, 1940 and 1947".

The exhibit shows a comparison of the freight revenues for 1940 and 1947, together with a percentage increase for the Florida East Coast Railway and other important railroads in the Southern Region. The figures are also shown for all roads in the Southern Region, and for all Class I Railroads.

Q. Now, this is expressed in dollars of revenue rather than tonnage as the previous exhibit?

The Court: Thousands of dollars?

A. Yes, sir, thousands of dollars.

By Mr. Milam:

Q. Yes, sir. A. There, again, the Florida East Coast Railway shows a larger percentage increase than any of the other railroads shown, and substantially larger increases than in the Southern Region, and for all Class I roads.

Mr. Milam: That exhibit is offered in evidence.

> The instrument last above referred to was received and filed in evidence and marked Objector, S. A. Lynch Interests' Exhibit No. 3.

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By Mr. Milam:

Q. Will you state the next exhibit and comment upon it? A. The next exhibit is headed, "Passenger Revenue—Comparisons, 1940 and 1947."

That exhibit is similar in form to the previous one, but shows the revenue, passenger revenue instead of freight revenue. It will be noted on this exhibit that the Florida East Coast has not done as well as the Atlantic Coast Line Railroad with respect to the increase in revenue. It is also slightly below the southern region, but it has also increased more than all Class I railroads.

Q. And, those percentages are expressed in the last column? A. That is right.

Mr. Milam: We offer that in evidence as an exhibit.

The instrument last above referred to was received and filed in evidence and marked Objector, S. A. Lynch Interests' Exhibit No. 4.

By Mr. Milam:

Q. What is the next exhibit, and will you produce it and comment upon it? A. The next exhibit is headed "Railway operating revenue comparisons, 1940 and 1947."

The exhibit is similar to the last two exhibits, except that it shows the information for total railway operating revenues.

Q. That is both passenger and freight? A. Passenger, freight and all other operating revenue, such as mail, express and incidental revenues.

The Court: It is just a combining of the freight revenues and passenger revenues? A. No, sir, it includes all operating revenues. It includes mail and express and milk. The percentages are shown in the last column and it will be noted that the increase for the Florida East Coast Railway is greater than for any other railroad shown on the Exhibit, and is substantially greater than for all roads in the southern region and all Class One roads.

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Mr. Milam: That exhibit is offered in evidence.

The instrument last above referred to was received and filed in evidence and marked Objector, S. A. Lynch Interests' Exhibit No. 5.

By Mr. Milam:

Q. Will you please produce the next exhibit and comment upon it? A. The next exhibit is headed, "Florida East Coast Railway Company, tons of revenue freight carried".

This exhibit shows the Florida East Coast freight traffic by the years from 1940 to 1947, inclusive. Subdivided into commodity groups in accordance with the Interstate Commerce Commission classification as commodities.

In addition, the exhibit shows the Receivers' estimates for a future year, which was introduced on March 19, 1941, at a hearing before the Interstate Commerce Commission.

The Court: What future year was that?

A. It was a future year from 1941 to 1945.

By Mr. Milam:

Q. Was it not a normal future year? A. It was supposed to represent the prospective future and an average year of the '41 to '45 period.

The Court: That was an estimate made by the Receivers. You undertook to show what it turned out to be.

A. That's right. In doing that, I have not made any comparison of the '41 to '45 figures that the Receivers estimated, because they included the war period, whereas traffic was much greater than anybody had anticipated. But, I have compared the latest post-war year, 1947, with the Receivers' estimates, and I have also compared the year 1947 with the year 1940, which was, as I explained before, the last full year before the Commission at the time this estimate was made—the Receivers' estimate was made. And you will note that the 1947 tonnage exceeds the 1940 ton-

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nage by 163 percent, and that it also exceeds the Receivers' estimates by 139 percent.

I should also mention that these figures are all taken from the Florida East Coast's annual report to the Interstate Commerce Commission.

Q. I note, Mr. Gordon, that there is a slight decrease in 1947 over 1946. Did your investigation show any reason for that? A. Yes. You will notice that in the first column of figures under "Products of Agriculture", the 1946 tonnage was 1,531,989, whereas 1947 tonnage was 1,057,646. That reduction was due to hurricanes, floods and freezes in 1947.

Q. As a matter of fact, there were two hurricanes in '47, weren't there? Or, do you know? A. I don't recall now.

Mr. Milam: That instrument is offered as an exhibit.

> . . . The instrument last above referred to was received and filed in evidence and marked Objector, S. A. Lynch Interests' Exhibit No. 6.

By Mr. Milam:

Q. Will you produce your next exhibit and comment on it? A. The next exhibit is headed, "Florida East Coast Railway Company, tons of revenue freight carried, nine months ended September 30, 1947 and 1948."

Q. That concerns the previous figures, does it not? A. That is correct. That brings the figures down to the latest figures available and shows the figures for the Florida East Coast divided in the same categories as in the previous exhibits. You will notice in connection with my comments on products of agriculture, that during the nine months of 1948 there has been an increase of 4.6 percent over 1947, which simply confirms what I said previously about 1947 being sub-normal.

Q. What was the shrinkage of the nine months in 1948 over 1947? A. Some of the commodity groups showed de-

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creases and some showed increases. The total—there was a total decrease which was quite nominal, being only 2.5 percent.

Q. Is that a normal fluctuation? A. Well, I think you would find in any period you took—I think you would find fluctuations greater than that.

Mr. Milam: This exhibit is offered in evidence.

> . . . The instrument last above referred to was received and filed in evidence and marked Objector, S. A. Lynch Interests' Exhibit No. 7.

By Mr. Milam:

Q. Produce your next exhibit and comment upon that. A. The next exhibit is headed, "Florida East Coast Railway Company, New Industries Located on Railroad, 1940 to 1947, inclusive, and number of carloads of road haul traffic handled in year 1947 to and from such industries."

Q. Will you outline, also, the source of your information on this exhibit? A. This information was furnished us by officers of the Trustees of the Florida East Coast Railway Company.

Q. What comment have you on that exhibit? A. Well, during the eight years from 1940 to 1947, there were two hundred and fifty new industries located on the Florida East Coast Railway, which gave them a traffic of 33,488 cars in 1947. This is approximately twenty percent of their 1947 business.

In addition to the two hundred and fifty industries, here shown, there were sixty-five industries which expanded their facilities during 1947. We were unable to obtain the additional traffic which the Florida East Coast enjoyed from that expansion as the figures were not available separately.

Just prior to coming to the hearing, I received from the officers of the Trustees the figures on new industries established in 1940, and during 1948 there were sixty-three new

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industries established on the Florida East Coast, on which they estimate they will receive 3,040 cars during the year 1948,—of new business.

In addition to those industries there were also fourteen industries which expanded their facilties during 1948 and the Trustees officers estimated that they will produce 725 additional cars of new business.

Mr. Milam: We offer the exhibit in evidence.

. . . The instrument last above referred to was received and filed in evidence and marked Objector, S. A. Lynch Interests' Exhibit No. 8.

By Mr. Milam:

Q. Produce your next exhibit and comment on that. A. The next exhibit is headed, "Comparison of Florida Rail and Water-borne tonnage, 1940 to 1946".

I would first call attention to the fact that the source for the figures in the last three columns is not given on the exhibit. Those figures were taken from the United States Army Engineers Annual Reports.

The second comment that I would like to make is that we used the year 1946 instead of 1947, because the 1947 figures were not available for the water-borne traffic.

The exhibit shows a large decrease in water-borne tonnage from 1940 to 1946. All traffic through ports competitive with the Florida East Coast Railway decreased 29 per cent.

If we exclude petroleum products, or, in other words, tankers, which traffic would not normally be competitive with the Florida East Coast, the decrease in water-borne traffic through the Florida ports is 94 per cent.

The decrease on the intracoastal waterway between Jacksonville and Miami was 34 per cent. At the same time, all rail tonnage, terminating on the Florida East Coast Railway, increases 108 per cent, and rail tonnage originating on Florida East Coast Railway increased 267 per cent.

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The columns headed "All Other", are shown simply as a matter of information. They show the originated tonnage on all other railroads in Florida other than the Florida East Coast increased 74 per cent, and terminated tonnage 73 per cent. That simply brings out the tremendous increase on the Florida East Coast as compared with other railroads. It is somewhat incidental to the main purpose of the exhibit.

Q. You said tankers and what they haul is not ordinarily competitive with rail. What did you mean by that? A. Well, simply this: As far as the Florida East Coast is concerned, that traffic is not susceptible of haul over the Florida East Coast Railway. That traffic is normally moved by tractor.

Mr. Milam: That exhibit is offered in evidence.

. . . The instrument last above referred to was received and filed in evidence marked Objector, Lynch Interests' Exhibit No. 9.

By Mr. Milam:

Q. Will you please produce your next exhibit and comment upon it? A. The next exhibit is headed "Comparison of Rail and Truck Tonnage in Southern Region", "1940-1947".

The comparison is shown here by years from 1940 through 1947, of the tonnage handled on the Florida East Coast Railway. The tonnage handled on all other Class I railroads in the Southern Region, and the truck tonnage of inter-city trucks in the Southern Region.

We were unable to obtain figures for the truck lines operating primarily in the Florida East Coast territory. This was the closest that we could come to it in comparing the Southern Region figures.

It will be noted that whereas the truck tonnage in the Southern Region increased 156 per cent, the Florida East Coast rail tonnage increased 163 per cent.

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The Court: For my information, does that term "Southern Region", have a technical term? Is that "Southern Region" a technical term, and does it have a definite meaning? A. Yes, it is the region defined by the Interstate Commerce Commission as "Southern Region", and it applies to both the railroads——

The Court: What I am getting at is whether you picked out the region or whether the Interstate Commerce Commission picked out the region. A. No. You will notice, your Honor, in the sources, we have given references to both the rail tonnage and the truck tonnage, and both of those statements, statistical statements, are issued by the Interstate Commerce Commission, and they both use the Southern Region in the same way.

The Court: That is what I wanted to know. A. Yes, sir.

By Mr. Milam:

Q. The trucks, however, had a larger increase than the Class I southern roads as a whole, did they not? A. That is right.

Mr. Milam: We offer that exhibit in evidence.

> . . . The instrument last above referred to, was received and filed in evidence and marked Objector, S. A. Lynch Interests' Exhibit No. 10.

By Mr. Milam:

Q. Will you please produce your next exhibit, and comment upon it? A. The next exhibit is headed "Comparison of Florida Fruit and Vegetable Shipments by Rail Freight, Express, Boat and Truck, by Seasons, 1939-40 to 1947-48, Inclusive."

This information was taken from the Florida State Marketing Bureau Annual Fruit and Vegetable Report, 1947-48 season.

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The principal point brought out by the exhibit is the fact that the tonnage of fruits and vegetables formerly moved by boat, no longer moves that way. Most of that business has gone to the rails. Some of it, apparently went to the trucks in 1947-48. You will note that in the earlier years, about 29 or 30 per cent of the traffic moved via truck whereas in '47-'48, 31 per cent. On the other hand, between 55 and 57 per cent of the traffic moved by rail in the earlier years, whereas in the latest year about 67 per cent moved by rail.

There has been a slight increase in the express shipments, but they are relatively a small portion of the total.

The Court: The trucks did something else here, during the war years, too.

A. Yes, of course, that is true with the boats. That is why there was no boat business. That boat business came back a little bit in '46-'47, but it is out of the picture altogether in the '47-48 season.

Q. Do you know whether or not as a matter of information, the boats were equipped with refrigeration? A. Yes, they are.

Q. As a matter of fact, Mr. Gordon, that water haulage by refrigerated boats was at least from Tampa, Fort Pierce and Jacksonville, was it not? A. I know about Fort Pierce and Jacksonville; I don't know about Tampa.

Mr. Milam: That exhibit is offered in evidence.

> . . . The instrument last above referred to, was received and filed in evidence and marked Objector, S. A. Lynch Interests' Exhibit No. 11.

By Mr. Milam:

Q. Please produce your next exhibit and comment upon it. A. The next exhibit is headed "Comparison of Revenue Passengers Carried, F. E. C. Railway versus Competing Air Lines, Water Carriers and Motor Coaches, 1940-1946".

There, again, we had to use 1946 instead of 1947 because certain of the figures were not available for the year 1947.

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The principal points brought out by this exhibit are in the first place that the air lines have taken a lot of the traffic which is competitive with the Florida East Coast Railway Company. You will notice that the figures in the last column show the air lines, the competitive air line situation.

No annual figures are available for air lines, but the Civil Aeronautics Board periodically makes studies of the traffic to and from each airport. From those studies, we have taken all of the passengers to and from Jacksonville, Daytona Beach, Vero Beach, West Palm Beach and Miami, for 1940 to 1946, and that shows a tremendous increase in air line traffic. 1056 per cent.

From 1940 to 1946, the competitive motor coach lines increased 270 per cent. Then we were able to obtain, there, figures for the three principal motor lines which are to a greater or lesser extent, competitive with the Florida East Coast. Florida Greyhound Lines, Glades Motor Lines and Tamiama Trails Tours.

The water competition to Florida ports—and there we have used the ports which are competitive with the Florida East Coast—shows a decrease of 18 per cent, and the Florida East Coast rail traffic shows an increase of 132 per cent. As is obvious, there are several unfavorable factors in that picture.

Q. Well, the bus lines are increasing more rapidly than rail lines, is that it? A. That is right.

Q. And the air lines more rapidly, relatively, than either? A. That is right.

Mr. Milam: That exhibit is offered in evidence.

> . . . The instrument last above referred to was received and filed in evidence and marked Objector, S. A. Lynch Interests' Exhibit No. 12.

By Mr. Milam:

Q. Will you please produce your next exhibit and comment upon it? A. The next exhibit is headed "Increase in

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Land in Farms, Counties Served by Florida East Coast Railway Company versus State of Florida and entire United States".

This exhibit is the first of several exhibits dealing with the agricultural situation. Wherever it was possible to obtain information by counties, we have done so.

This exhibit shows the increase in land in farms from 1940 to 1945, for the counties served by the East Coast at 74.8 per cent.

The Court: Now, this is acreage in farms?

A. That is correct.

Q. Who did you say got up this information? A. This is all prepared by the United States Census Bureau.

During the same period, the State of Florida showed an increase of 56.9 per cent, and the United States, as a whole, 7.6 per cent.

Now, these counties listed here, they are traversed by the Florida East Coast?

A. That is correct.

By Mr. Milam:

Q. That exhibit is offered in evidence.

Mr. Bourne: Your Honor, I think I ought to make an objection to this particular exhibit as being immaterial and irrelevant.

My view is this is not a retrial here of the fairness of the plan. That is, of the valuation made by the Commission, in terms of securities. The question is whether the Commission's decision is supported by material evidence; then, whether there are changes in conditions since the date of the Commission's report.

Now, in some of the other exhibits, there was something, apparently, pertaining to a period subsequent to what the Commission acted on. I shall give everyone the benefit of the doubt, but it seems to me quite clear that the comparisons of the years between 1940 and 1945, and I think is objectionable, and I thought I should make it at least.

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The Court: I think it goes to the weight of it. The general purpose is to show the growing territory and it would have an effect in the growth of the territory.

Mr. Bourne: I want to submit my point, to preserve it, on any issue before your Honor, as to any special growth since the Commission acted.

The Court: I do not quite go with you on that.

Mr. Bourne: I want to be heard later, and I want to make it now.

The Court: I do not want to express an opinion on it now——

Mr. Bourne: I want to make my position clear.

The Court: I will admit the evidence.

> . . . The instrument last above referred to was received and filed in evidence and marked Objector, S. A. Lynch Interests' Exhibit No. 13.

By Mr. Milam:

Q. Will you please produce and comment on the next exhibit? A. The next exhibit is headed "Increase in Orange and Grapefruit Production, Counties Served by Florida East Coast Railway Company versus State of Florida and Entire United States."

The Court: This is nothing but the main agricultural products of Florida, put in another shape? A. That is right.

Mr. Milam: That exhibit is self-explanatory and we offer it in evidence.

> . . . The instrument last above referred to was received and filed in evidence and marked Objector, S. A. Lynch Interests' Exhibit No. 14.

By Mr. Milam:

Q. Will you produce the next exhibit and comment on it, please? A. It is headed "Value of Vegetable Crops Harvested for Household Use".

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The Court: The same thing? A. That speaks for itself.
Mr. Milam: That is offered in evidence.

. . . The instrument last above referred to was received and filed in evidence and marked Objector, S. A. Lynch Interests' Exhibit No. 15.

By Mr. Milam:

Q. Will you please produce and comment upon the next exhibit? A. The next exhibit is headed "Farm and Agricultural growth Indicators, Florida and the United States."

This exhibit shows for pre-war years and post-war years, certain agricultural indicators, comparing Florida and the United States.

It will be noted that in each of the items, except the last one, that the increase in Florida is generally substantially greater than the increase in the United States as a whole. In the last item, fresh fruits and vegetables shipped, Florida shows a 20 per cent increase, as compared with 27.9 per cent increase for the United States as a whole.

The Court: I guess they all know the dollar is only half a dollar now.

By Mr. Milam:

Q. In each case did you use the latest data available? A. Yes, sir, and although three of the items are shown in millions of dollars, four of the items are shown in other units. For example, the number of heads of cattle is shown in thousands. The grapefruit and orange and tangerine products is shown in thousands of boxes, and fresh fruits and vegetables in carload shipments.

Mr. Milam: We offer the exhibit in evidence.

. . . The instrument last above referred to was received and filed in evidence and marked Objector, S. A. Lynch Interests' Exhibit No. 16.

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By Mr. Milam:

Q. Will you please produce and comment on the next exhibit? A. The next exhibit is headed "Increase in Population". The exhibit, I believe, speaks for itself. The sources are shown at the bottom of the exhibit.

Q. Now, what was the idea of tracing out increasing population? A. Well, population is, of course, an indication of growth, and an indication of market growth. An indication of business and industrial wealth. It is an important factor in connection with the growth of any area.

Q. Well, then, from this exhibit, does it show that Florida increased in population in the seven-year period 29.2 per cent? A. No, sir, it shows that the counties served by the Florida East Coast increased 29.2 per cent. Florida, as a whole, increased 25.5 per cent, and the United States increased 9.2 per cent.

Mr. Milam: We offer the exhibit in evidence.

. . . The instrument last above referred to was received and filed in evidence and marked Objector, S. A. Lynch Interests' Exhibit No. 17.

By Mr. Milam:

Q. Now, will you please produce and comment upon the next exhibit? A. The next exhibit is headed "Increase in Effective Buying Income."

That exhibit shows that although the counties served by the Florida East Coast increased slightly less than the State of Florida, as a whole, the increase was much greater than in the United States as a whole.

Mr. Milam: That exhibit is offered in evidence.

. . . The instrument last above referred to was received and filed in evidence and marked Objector, S. A. Lynch Interests' Exhibit No. 18.

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By Mr. Milam:

Q. Will you produce, please, and comment upon the next exhibit? A. The next exhibit is headed "Increase in Retail Sales". In the case of retail sales, the counties served by the Florida East Coast increased slightly more than the State of Florida as a whole and substantially more than the United States as a whole.

Mr. Milam: We offer the exhibit in evidence.

. . . The instrument last above referred to was received and filed in evidence and marked Objector, S. A. Lynch Interests' Exhibit No. 19.

By Mr. Milam:

Q. Please produce and comment upon your next exhibit? A. The next exhibit is headed "Market Growth Indicators, Florida and the United States."

This exhibit contains a number of market growth indicators comparing Florida and the United States in a pre-war year and in a post-war year. The latest available in each case.

The sources are shown at the bottom of the exhibit, and it will be noted that in each instance except one, the percentage increase in Florida is greater, and usually substantially greater than in the United States as a whole.

The one instance in which the State of Florida shows to a disadvantage is in the case of cash receipts from farm marketing. I have previously mentioned that the year 1947 was not a good year because of the freeze and floods resulting from the hurricanes. That is borne out by these figures.

If we substitute the year 1946 for the year 1947, the percentages in the last column become, for Florida, 278.0 and for the United States 197.5.

Mr. Milam: We offer the exhibit in evidence.

. . . The instrument last above referred to was received and filed in evidence and marked Objector, S. A. Lynch Interests' Exhibit No. 20.

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By Mr. Milam:

Q. Will you produce and comment upon the next exhibit? A. The next exhibit is headed "Business and Industrial Growth Indicators, Florida and the United States".

The sources are shown at the bottom of the exhibit. The comparison is similar to the previous exhibit, in that we have taken and compared a pre-war year with the latest post-war year available, and in every instance, except one, Florida shows a larger percentage increase than the United States as a whole. The sole exception being in the case of construction contracts awarded, where the percentage increase for Florida is 72.5 compared with 87.1 for the United States as a whole.

Mr. Milam: We offer the exhibit in evidence.

> . . . The instrument last above referred to was received and filed in evidence and marked Objector, S. A. Lynch Interests' Exhibit No. 21.

By Mr. Milam:

Q. Will you produce, please, and comment upon the next exhibit? A. The next exhibit shows the increase in the value of manufactured products, Florida versus the United States.

The comparison is made between 1939 and 1946, the latest year available.

It will be observed that the percentage increase in Florida is substantially greater than in the United States as a whole. Not only for the durable goods industries, but for the non-durable goods industries.

Q. Again, that is expressed in dollars? A. It is expressed, for Florida, in millions of dollars and for the United States, in billions of dollars.

Mr. Milam: We offer it in evidence.

> . . . The instrument last above referred to was received and filed in evidence and marked Objector, S. A. Lynch Interests' Exhibit No. 22.

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By Mr. Milam:

Q. Will you produce and comment upon the next exhibit? A. The next exhibit consists of two sheets and is headed "Florida East Coast Railway Company, Net Income Available before Federal Income Taxes and Fixed Charges, Adjusted to Eliminate Non-Recurring Items and to Reflect Changes in Freight Rates, Passenger Rates, and so forth."

Q. No, we will pass this one for the moment. Take up your exhibit, "Statement of Estimated Cash Required for Extraordinary Additions." A. The statement of estimated cash required for extraordinary additions and betterments is based on information furnished by the Trustees of the Florida East Coast Railway Company.

Q. Are you through? A. No, I would like to comment on it a little.

In the first column of the exhibit is shown the figures taken from Exhibit 96 before the Interstate Commerce Commission.

Then, in the next two columns are shown the additional expenditures for the years 1946 and 1947, and in the next column, the estimate for 1948, which was furnished by the Trustees of the Railway Company.

Then, those figures for '46 to '48, inclusive, are deducted from the figures in the first column which show the balance required for 1949 to 1955.

The last column shows that if all of these improvements are carried through on the basis of the original estimate, the total cash required would be only $426,000.00. Of course, the reason for that is that the depreciation accruals in the current income account would take care of a substantial sum of money.

Now, I think it should be pointed out, there, that the largest item remaining in the program is new stations and terminal facilities. That amount is the same that it was in Exhibit 96, and even prior to Exhibit 96, since nothing has been expended for new stations and terminal facilities up to the present time.

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In view of the decline in passenger traffic, there is some question whether such expenditures would be justified.

Q. On which you offer no opinion? A. No.

Mr. Milam: That exhibit is offered in evidence.

. . . The instrument last above referred to was received and filed in evidence and marked Objector, S. A. Lynch Interests' Exhibit No. 23.

Mr. Milam: The next exhibit has to do with passenger service, has it not? A. Yes, sir.

Q. Produce it, and comment upon it, please. A. It is headed "Florida East Coast Railway Company Comparison of Pre-War, Peak-War and Post-War Passenger Ticket Sales at Miami and West Palm Beach."

That information shown on the exhibit is based on data furnished us by the Trustees of the Florida East Coast Railway Company, and the figures show that in 1947, the traffic, the passenger traffic, at both of these stations, was way below the peak-war year. In fact, the decrease in passengers is really more than is shown here, because the figures are shown on a dollar basis, and there has been an increase in fares recently.

Q. So that in number of passengers, the percentages are somewhat less on account of 1947 having increased fares, is that right? A. 1947, yes, sir.

Mr. Milam: We offer it in evidence.

. . . The instrument last above referred to was received and filed in evidence and marked Objector, S. A. Lynch Interests' Exhibit No. 24.

By Mr. Milam:

Q. Will you turn back to Exhibit 2. What was Exhibit 2, that you offered in evidence? A. That showed a comparison of the tonnage originated on line and tonnage terminated on line, Florida East Coast versus competing railroads, Southern Region, and all Class I roads.

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Q. Did you then prepare a more detailed schedule of that tonnage performance of the Florida East Coast? A. Yes, sir.

Q. In how many schedules? A. Well, there is one——

Q. Did you—two schedules. A. There are two exhibits, yes.

Q. Will you produce the first one having to do with the origin of tonnage and comment upon that. A. The first exhibit consists of 17 sheets and shows the details of traffic originating on line of the Florida East Coast and competing roads and so forth.

The various sheets of this exhibit show comparisons by years from 1940 through 1947.

In the first place, for the various groups of commodities as specified by the Interstate Commerce Commission, and in the second place for certain more important selected commodities.

In addition to showing the percentage of 1947 over 1940, the exhibit shows, for the Florida East Coast Railway, the percentage increase or decrease of the first nine months of 1948 over the corresponding period in 1947.

The last page of the exhibit shows a comparison of the total carload and l. c. l. traffic originating on line. It will be noted that whereas the Florida East Coast Railway Company increased 220 per cent, the Atlantic Coast Line Railroad increased only 88 per cent, The Seaboard Air Line, 72 per cent, The Southern Region, excluding the Florida East Coast, only 67 per cent. All Class I roads in the United States, excepting the Florida East Coast, only 52 per cent.

It will be further noted during the first nine months of '48, the originated tonnage on line, on the Florida East Coast, increased 2 per cent over the corresponding period of last year.

Now, I do not think it is necessary to go through all of the detail of these exhibits, but I would like to point out one or two items.

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On the second sheet of the exhibit, in the tonnage of bananas, it should be pointed out that that traffic is not permanent traffic but it was brought about entirely by the war-time situation, where the fruit steamers were out of service, and small boats were plying back and forth between Florida and the West Indies. It, you will note, has been decreasing. It dropped in '47 from the previous year, and there has been a large drop in the first nine months of 1948. I think, eventually, that will probably almost entirely disappear.

In connection with the next sheet of the exhibit, tonnage of oranges and grapefruit, it should be noted that whereas the Florida East Coast Railway shows an increase in 1947 over 1940, of 33 per cent, which is far and way above any other road, that even that figure is low because of the 1947 freeze and floods.

You will note that in the first nine months of 1948, the Florida East Coast shows a further increase of 63 per cent over 1947 in the handling of oranges and grapefruit. It will be noted that on the sheet showing the tonnage of pulpwood, that in 1940, the Florida East Coast handled no tonnage, whereas in 1947, they handled 137,000 tons, which increased further in 1948.

I think the other figures speak for themselves. Some of them show large increases and a few show unfavorably, but of course, they are all summed up in the last sheet of the exhibit.

Mr. Milam: We offer the exhibit in evidence.

. . . The instrument last above referred to was received and filed in evidence and marked Objector, S. A. Lynch Interests' Exhibit No. 25.

By Mr. Milam:

Q. Now, the last of those exhibits has to do with the tonnage of products of agriculture, terminated on line, is that correct? A. Yes, sir.

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Q. Produce that exhibit and comment briefly upon it. A. It is similar to the previous exhibit except that it shows traffic terminated on line, and the summary is shown on the last sheet of the exhibit. It again shows that when traffic terminated on line, the Florida East Coast has obtained a much larger percentage increase in effect than any of the other roads or areas shown on the exhibit.

Now, I might say with respect to the selection of the individual commodities on these two exhibits, they are commodities which, in 1947, represented more than one per cent of the Florida East Coast freight revenue. There are one or two exceptions to that. The only one I think of at the moment is the pulpwood tonnage, which is somewhat less than one per cent of the revenue, but which I thought was an important movement, since it was a new movement and there was none of that tonnage handled in 1940.

Mr. Milam: That exhibit is offered in evidence.

. . . The instrument last above referred to was received and filed in evidence and marked Objector, S. A. Lynch Interests' Exhibit No. 26.

Mr. Milam: The Trustees, at our request, made copies of the balance sheet of the Florida East Coast Railway on September 30, 1948. That is offered in evidence.

The Court: Is there any objection to what the Trustees say about that?

Mr. Milam: I say that they prepared it at our request.

The Court: Yes. I say, is there any objection to it? This is independent of your exhibit.

Mr. Milam: Yes, sir.

Mr. Thomson: Is this being introduced through the Trustees? Is that my understanding?

Mr. Milam: I will put the Trustee on the stand if you want, but we asked them to prepare it.

The Court: Let us get through with this witness first. Are you through with him?

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Mr. Milam: No, sir.

The Court: Well, we will take a rest anyway.

. . . And thereupon, an informal recess was had, thereafter the following proceedings being had:

The Court: Have your seats, please. Proceed.

By Mr. Milam:

Q. Mr. Gordon, did you make a study of the income of this railroad for the three post-war years of 1946, '47 and '48? A. Yes, sir.

Q. Did you make a study of the abnormalities and non-recurring items, both in income and expense? A. Yes, I did.

Q. Will you state the source of that study, what you did, and the result of the study? A. The source of the information is from—the information is taken from published reports for the Florida East Coast Railway Company and from other information obtained from the Trustees and their officers.

The 1946-'7 and '8 years represent three post-war years. Now, obviously, with all of the changes which have been taking place in wage rates, increased wage rates, increased material prices, changes in taxes, the unusual rail re-laying program and other non-recurring items, it does not mean very much to compare the actual reported figures for those years. In other words, it is necessary to normalize those figures in order to determine what the normal post-war income of the Florida East Coast is. For that reason, we have adjusted the reported figures of income available for Federal taxes and fixed charges as follows:

In the first place, we adjusted the net available for non-recurring expenses to items—non-recurring expense items, such items being the rail re-laying program, estimated deferred maintenance made up, estimated increased maintenance because of hurricanes and floods, and, the Okeechobee Branch retirement.

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All of those adjustments were made on the basis of figures furnished me by the Trustees of the Florida East Coast.—or, their officers.

Q. Do you mean that the estimated increased maintenance on account of hurricanes and floods was a figure furnished by the Trustees? A. That is correct. We also adjusted the income account for non-recurring revenue adjustments. For example, the estimated revenue losses because of hurricanes and for freezes and floods of 1947 and 1948, and in addition, an adjustment for retroactive Railway Express settlements.

Now, that latter figure results in a reduction in the net income available, because, during a part of '47 and all of '48, the Florida East Coast Railway was receiving from the Express Company, additional revenue which applied to a prior period.

Now, those two items, non-recurring revenue items, were also furnished to us by the Trustees of the Florida East Coast, or their officers.

The third category of adjusted—the third category of adjustment includes operating savings resulting from capital expenditures, and these are classified under four headings.

The Fort Pierce cut-off, new Diesel locomotives for passenger trains, stainless steel passenger cars and shop machinery. There, again, the basic information with respect to those adjustments was furnished by the Trustees of the Florida East Coast.

The fourth category of adjustments includes increased rates and fares. Now, what we have done there is to restate all three of these years on the basis of the present freight rate level, present passenger fare level and the present male pay rates.

The information necessary to make those adjustments was furnished by the Trustees of the Florida East Coast, or their officers.

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The last category of adjustments includes increased wage rates, increased prices for materials and increases or decreases in taxes.

The first item under this category is wage rates, and the wage rates have been adjusted to September 30, 1948, which would be to the present increases of last fall.

May I say there, also, in connection with the freight rates, that the adjustment in the freight rates does not include the increase which is supposed to go into effect today.

The Court: To what basis have you adjusted back? The 1946 basis, or—?

A. No, I have adjusted to what we might call the present-day basis, but because of the fact that this new round of wage increases started in the fall and have not been compensated for by increased rates, we have not included that. So, what we have done is to adjust to September 30, 1948 basis.

Q. You are adjusting 1946 and 1947 up, then? A. That is right. On both rates and cars.

By Mr. Milam:

Q. Well, then, in normalizing the income, you put the increased fares in operation, as it were, back in 1946 and 1947? A. That is right.

Q. But you also put the increased expenses back to those years? A. That is right.

Q. And you do it as to the situation that exists on September 30, 1948? A. Yes, sir.

The Court: The purpose of that is to compare it more accurately as you see it?

A. To these three post-years, post-war years, yes, sir. Fuel oil prices and Diesel oil prices were adjusted and materials and other supplies were adjusted to June, 1948, a mid-year point that was the latest information available.

Hire of freight cars was adjusted to the present $1.50 per diem rate.

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The railway retirement tax was adjusted to the present rates which are higher than they were at the beginning of '46.

The railroad unemployment tax, reduced to the present basis, the lower basis going into effect as of January 1, 1948, and ad valorem taxes were adjusted to 1948, assessed on value and rates.

Now, the result of all of these adjustments is that the adjusted net available for Federal income taxes, and fixed charges is as follows:

1946, $3,458,000.00.

1947, $2,522,000.00;

1948, $2,855,000.00.

Or, an average for the three years of $2,945,000.

Q. You have put that in exhibit form, have you, with detailed figures? A. Yes, sir.

Q. Will you produce that exhibit? A. Yes, sir.

Mr. Milam: We offer it in evidence.

> . . . The instrument last above referred to was received and filed in evidence and marked Objector, S. A. Lynch Interests' Exhibit No. 27.

By Mr. Milam:

Q. Now, Mr. Gordon, a little further detail on this—Rail re-laying program. Is that the program upon which the East Coast is now embarked, is that a normal or extraordinary program? A. It is an extraordinary program. It involves a re-laying of their entire main line with heavier rail, and has been going on since 1942.

Q. To be completed, when?

The Court: If you can get the rail, you mean?

Mr. Milam: They have been getting it fairly fast.

A. (Producing exhibit.)

The Court: It is about two-thirds done, according to one of these exhibits.

Mr. Milam: Yes, sir.

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A. I think it is a little more than that, your Honor. I think somewhere between 70 and 75 per cent done.

Originally, the program called for the completion of the rail re-laying in 1949. Now, I have not checked on that recently to find out what the present estimated date of completion is.

Q. Very well. Now, how long does such rail as that normally last? A. Well, I would say, conservatively, somewhere between twenty and thirty years.

Q. Under normal conditions, is rail re-laid gradually rather than all at once, over a system? A. Well, that all depends. If it is a replacement in kind, the normal process is to do a few miles each year. If the road is changing its standard to a heavier weight of rail throughout on its main line, it usually will do it in a relatively short space of years.

Q. Mr. Gordon, I note from the figures furnished that approximately 77 per cent of this cost of the rail re-laying program is being charged to operating expense. Is that your recollection? A. That sounds about right. I haven't checked the figure to see.

Q. All right. The figures speak for themselves. That arises, as I understand it, out of the fact that only the increased weight of the rail is charged to capital? A. Yes, sir.

Q. Your second item, I believe you said that estimated deferred maintenance made up was the Trustees' own figure? A. That is right.

Q. As well as the estimated increased maintenance account of hurricanes and floods? A. Yes, sir.

Q. Tell the Court what that large figure on the Okeechobee Branch retirement is, that is charged to operating expenses? A. Well, that resulted from the retirement of the Okeechobee Branch, which retirement was charged to operating expenses in 1947. There was a slight adjustment, or smaller adjustment for salvage in 1948, which explains the minus 119,000 in that year.

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Q. Well, in simple words, to the lay mind, when the Okeechobee Branch was abandoned and dismantled, it created a large charge to operating expense; is that correct? A. That is correct.

Q. Even though the Fort Pierce cut-off was substituted largely to take its place and accomplish savings? A. That is right.

Q. You considered that charge to operating expense an abnormal item? A. It was abnormal and a non-recurring item.

Q. Now, 2(a), estimated revenue losses account hurricanes, freezes and floods. Let us be quite accurate in that: Did the Trustees furnish you that figure, or, the basis for it? A. They furnished us the basis for that figure.

Q. Would you explain that to the Court? A. Surely. The Trustees furnished us with the estimated revenue loss because of the hurricanes, freezes and floods, and we took fifty per cent of that figure as the estimated net revenue loss. In other words, we assumed, since there was quite a substantial volume of business involved, we assumed a fifty per cent out-of-pocket cost. That was purely an estimation on my part.

Q. And, in your judgment, a fair estimate? A. I think so. I think it was certainly ample.

Q. Your next series of items have to do with operating savings resulting from capital expenditures. The estimate of $204,000.00 for 1946 for the Fort Pierce cut-off, was whose figure? A. Well, that particular figure is our computation, but the annual savings was based on—no, excuse me, I am wrong. The fifty-one thousand dollar '47 was our computation. The $204,000.00 is the Trustees' figures. Estimation of the savings.

Q. The Trustees estimated what the annual savings would be each year? A. That is right.

Q. At $204,000.00? A. Yes, sir.

Q. How about the estimated savings from Diesel locomotives? Is that a figure of the Trustees? A. Well, that's

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sort of a joint figure there. We worked with the Trustees' officers in arriving at the cost per train mile for Diesel and steam locomotives.

Q. Yes. A. And the basic information was furnished by the Trustees, but we made the final computations ourselves.

Q. In your opinion, it is accurate and fair? A. Yes, sir.

Q. Does that apply to the next two items? A. Yes, sir.

Q. Now, as I understand, under increased rates and fares, the information for that computation was all furnished by the Trustees or their officers? A. That is correct. And, with respect to those figures, the final computations were all reviewed with officers of the Trustees, and they agreed that the estimates were reasonable.

Q. In other words, in all this study, you worked and cooperated with the Trustees and their officers? A. That is correct. I might say that with respect to the freight rates, that one of the officers of the Trustees, after the computation had been reviewed, stated that he felt that our freight rate adjustment was a bit on the conservative side.

Q. Well, you meant it to be that way, didn't you? A. Well, we tried to be fair about the thing, and of course if we are going to err at all, we would rather err on the conservative side.

Q. I understood from your testimony that proposed wage increases and freight increases since September 30, 1948, have not been considered? A. That is right.

Q. Did you assume anything with respect to rate increases compensating for cost increases? A. Well, not—only with respect to the latter part of '48, of course.

Q. All right. A. We have just gone as far as '48.

Q. All right. Who furnished you, or did you make up the list of abnormal items to be computed and non-recurring items? A. Well, I cannot answer that directly. I will answer it this way: That there were certain items that we knew that were non-recurring, such as the rail re-laying program. The other items were furnished—I think most of the other items were furnished by the Trustees, in answer to our request that they furnish us with non-recurring items.

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Q. Now, there are some exceptions to that. For instance, this retroactive express settlement. We just happened to run into that when we were going over the various figures with the Trustees. They had not mentioned it as a non-recurring item, but it actually was such, and we adjusted for that.

Q. And, by decreasing the income accordingly? A. That is right.

Q. Is that matter of adjusting for abnormal and non-recurring items a usual approach in railroad surveys and accountings? A. Well, it is the usual approach if you are trying to put certain years on the same basis, or if you are trying to get the normal earning power of a company, or, if you are trying to make a forecast of the immediate future. I do not think it is a normal procedure as far as an individual railroad that is just pursuing its normal way, but each of those items, although the railroad may not combine the effect of all of them, each item is considered by railroad management.

For example, when they have non-recurring items, they want to know how much it is costing them. And, whenever a proposal comes up for a wage increase, they want to know how much that is going to cost them a year. Likewise, when they go in for a freight rate increase and they decide they have to have more money, that is figured out as to what estimated increase they have got to have. So that there is nothing unusual about any of these items. It is part of the normal management.

Q. Now, Mr. Gordon, what, in your opinion, would be the normal operating revenues and the net income available for income taxes and fixed charges of this railroad in a normal future year? A. Well, I would say that based on the studies of these three post-war years, that we have taken into consideration, the outlook generally at this time, and that during the next four or five years the revenues of the Florida East Coast Railway should be in the neigh-

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borhood of $29,000,000 a year, and that the net available for Federal income taxes and fixed charges would be in the neighborhood of $2,850,000.00 per annum.

Q. That is for a future normal post-war year? A. Well, I was limiting it to the next four or five years, because we don't actually like to prognosticate much beyond that. But, if we go to ten years, we may get into the use of the atomic energy in this period. We do not know what is going to happen.

Q. So far as you could say, now, would that be the normal income for the normal post-war year? A. I believe so, yes, sir.

Q. In your judgment, that is a fair and conservative figure? A. I think it is.

Q. Now, is income—tell the Court as a matter of practice, is it generally estimated beyond the five-year period? A. No, I don't know of anybody that goes beyond five years in making his estimates or forecasts, as a general rule.

Q. Do you know what the Interstate Commerce Commission does? A. I don't believe that—I haven't seen any figures of their's, recently, as to any forecasts.

Mr. Milam: Your witness.

Cross examination by Mr. Bourne:

Q. Mr. Gordon, you said that in deciding what year to use as a base for the purpose of making these statistical comparisons, contained in the exhibits, you decided that you should take the year 1940; is that correct? A. That is right.

Q. And you said that you made that decision because you said that the plan which the Commission adopted, which was later returned by the Court to the Commission in 1942 or 1943, was based on a record, and in that record the latest forecast of earnings which could have been made was for the year 1940. Is that right? A. Not quite.

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Q. Would you state it in your own way, please? A. The latest year available to the commission and to the Receivers, when the Receivers made their forecast, was the year 1940.

Q. In other words, the Commission could not have used any later figures than at the time when it forecast normal earnings of $1,268,000? A. That is right.

Q. That is the basis? A. Yes, there is no implied criticism of either the Receivers or the Commission, because that was the latest year available.

Q. Well, I understood that. Now, it is a fact, isn't it, that in 1944, a record was taken before the Commission relating to future earning power of the Florida East Coast? A. I don't recall the exact date, but I know that was true.

Q. I am talking now about the hearing which preceded the Commission's report of January 8, 1945. A. Yes.

Q. And it is a fact, isn't it, that at that hearing one of your partners testified? A. That is right.

Q. And, what was his name? A. M. C. Kennedy.

Q. And, didn't he, at that time, give an estimate of future normal earnings? A. Yes, sir.

Q. And then the Commission, in its report of January, 1945, having listened to the testimony, or considered the testimony of Mr. Kennedy, and of other witnesses, made a new estimate, isn't that correct? A. I don't think they made any new estimate of traffic. My understanding was that they did not change the traffic or the revenue estimated, but they did increase the estimated net available for charges from one million two hundred odd thousand dollars to nearly five hundred thousand dollars, and that is my understanding, but it was based on consideration of certain savings that would result from capital expenditures.

Q. Is it your hypothesis, that in 1945,—January 8, 1945—the Commission made its estimate of normal earning power directly on the basis of figures that were in the record pertaining to the year 1940? A. Plus the Receiver's estimates for the years '41 to '45, Mr. Bourne. They didn't

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have anything to base it on, because wou were in a war period then. Now, obviously, war earnings don't mean anything as far as making an estimate for post-war years.

Q. Hasn't that been—you spoke, did you not, of other railroad cases in which you appeared as an expert? A. Yes, sir.

Q. Including the Rock Island? A. Yes, sir.

Q. The Denver and Rio Grande? A. Well, I didn't appear as a witness in that case.

Q. In which you were active? A. Beg pardon?

Q. In which you were active? A. Well, we did some work preliminary to that.

Q. Don't you know that it has been a frequent charge against the Commission's valuations that after a lapse of years, the valuations are said to have been predicated on early data? In the Rock Island and in the Denver, for example? A. Well, I know that generally. I haven't been closely in touch with those. But, of course, much of that criticism came about during the high earning war years. Now, we have gone beyond that stage, and we are in a period where we have had a period of three years of post-war traffic and post-war earnings.

Q. Well, isn't it the fundamental hypothesis that in 1944, ending in the report of January 8, 1945, and again after the hearings in 1945, culminating in the report of April 8, 1947, and then, after taking judicial notice, or, taking notice of intervening earnings records, and having a re-argument January 8, 1948, the Commission still proceeded on the basis of traffic estimates pertaining to the year 1940. Isn't that what you are trying to say? A. Well, 1940 and the Receivers' estimate which would come up higher than 1940. I think that is right.

Q. Well, when you say that, aren't you undertaking to draw an inference from the record and the reports as to the processes that the Commission followed in reporting the conclusions that it reached? A. No, I don't believe so. I know what figures they had in there when they started out.

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I know what estimates they had and what the original plan was based on, and I know that they didn't modify that plan as far as estimation of traffic is concerned. They simply upped the net available by two hundred odd thousand dollars.

Q. Well, you acknowledge, don't you, Mr. Gordon, that there are other factors that have to be considered in estimating the normal income besides the movement of traffic? A. Oh, yes, indeed.

Q. It is necessary to estimate the rates? A. Sure.

Q. It is necessary to estimate the costs, is that correct? A. That is right. That is what I have attempted to do for these three post-war years.

Q. In your whole series of exhibits, haven't you proceeded on the hypothesis that the Commission's final judgment was based on traffic data pertaining to the year 1940? A. I wouldn't say so. I think that in the first place that I knew that when they had the original hearing in 1941, that 1940 was the latest year they had, and that the Receiver's estimates were made at that time. Obviously, the Commission has facilities to publish reports currently. I do not believe they ever saw the set-up of the three post years, the three post war years similar to that shown in my exhibit.

Q. I intended my question to mean as to just what took place. You testified that in 1944, your partner, Mr. Kennedy, appeared as a witness in the hearings that preceded the report of January 8, 1945. Isn't that right? A. That is right.

Q. And then, in 1945, in November, at West Palm Beach, you, yourself, appeared as a witness? A. That is correct.

Q. You criticized and requested a larger estimate than a million five hundred thousand dollars a year; isn't that correct? A. That is correct.

Q. And you made a forecast at that time, isn't that right? A. Yes.

Q. And you produced exhibits? A. That is right.

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Q. And, in 1948—withdraw that, please. Then that was followed by the Commissioner's report of April 8, 1947, isn't that correct? A. I believe so. I don't recall the exact date.

Q. Then, in 1948, Major Oliver and Mr. Milam appeared before the Commission, in January, and argued again for more favorable treatment, or whatever you choose to call it, under the plan. Isn't that right? A. I believe that is right.

Q. And that time they distributed, did they not, to the Commissioners, numerous sheets containing various information? A. I wasn't there, but I understand that they did.

Q. Were they prepared by you or your firm? A. I think some of them were and some of them were not.

Mr. Bourne: Have you those here, Mr. Milam?

Mr. Milam: No, sir.

Mr. Bourne: Has Mr. Scott got them?

Mr. Milam: I think we gave you copies of everything we had at that time.

Mr. Bourne: I think so. I thought you had them here now.

By Mr. Bourne:

Q. Do you recollect whether or not the forecast of normal year earnings made by counsel for the Lynch interests at that hearing in January, 1948, was one prepared by you or, sponsored by you or anyone in cooperation with you, or whether it was one sponsored by counsel? A. Well, I don't recall that we prepared any forecasts of earnings in connection with that hearing.

Q. Well, I call your attention to this paragraph from the Commission's report of March 25, 1948, which reads:

"Estimates of normal future year income submitted by the Lynch interests range from $1,947,000.00, testified to by the witness Gordon, at the further hearing in 1945, and $3,644,000.00 stated by counsel for the Lynch interests at

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the January, 1948, argument, as the normal estimated net available for the year 1947, after numerous adjustments."

A. Well, that figure, that first figure is—the million nine hundred odd thousand dollars is the figure that I testified to at the hearing.

Q. That is correct. Now, do you know whether or not your firm or you or your firm sponsored the three million, six hundred and forty-four thousand dollar figure? A. I don't recall offhand. We may have assisted counsel in preparing that, but I do not recall at the moment.

Q. You have no data here with you which would indicate what part, if any, you had in reaching that figure? A. No, I don't. I am sorry.

Q. Well, now, how does that figure compare with the figure for the year 1947, which you just testified to this morning? A. Well——

Q. By how much? A. Higher than possibly '47.

Q. Higher, by how much? A. Well, it is almost the same as my adjusted figure for 1946——

Q. I was asking about '47, wasn't I, Mr. Gordon? A. But it is about one million one hundred thousand dollars higher than my estimate for '47.

Q. And, it is in the report, an estimate for '47, isn't it? A. Well, that is the way it states it here, yes.

Q. Now, your exhibits contain a number of figures or a number of your exhibits contain figures which relate solely to the Florida East Coast or relate to the Florida East Coast, and other railroads, generally, or, railroads in a particular section, isn't that true? A. That is right.

Q. And then you have some which contain comparisons between the Florida East Coast and the Atlantic Coast Line in some particulars; isn't that correct? A. Well, not specifically. Our comparisons are between the Florida East Coast, the Atlantic Coast Line, the Seaboard Air Line, and, generally, roads in the Southern Region.

In some cases, we used all roads in the State of Florida where those figures were available, but we haven't singled out the Atlantic Coast Line.

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Q. In other words, you have not undertaken to compare, have you, the value—now, use that word in any sense that you please—of the allowance of securities and cash provided in the Commission's plan, and of the allowance of securities and cash which might be provided for in what Judge Strum called an internal reorganization? A. No, sir, I paid no attention to that.

Q. Now, is the expression of your opinion as to the normal income of the Florida East Coast available for taxes and interest and fixed charges, based primarily on the Lynch Exhibit No. 27, which shows adjusted results for the years 1946, '47 and '48? A. I would say it is based fundamentally on that, plus my own judgment.

Q. Well, now, isn't it very important for the Florida East Coast—wouldn't it be very important to the Florida East Coast if it were independently reorganized, what rates it had? A. Oh, surely.

Q. Have you made a study of that subject? A. Not a detailed study, other than what I have done in connection with the adjusting of the three years to the rates in effect in September.

Q. Are you familiar with the important rate case which is pending which involves divisions with the northern railroads? A. I know there is a case involving divisions, but I don't know anything about the details.

Q. Have you any knowledge of what the prospects are that more favorable divisions will have to be given to the northern railroads? A. No, I don't know. I don't know anything about that case.

Q. Have you any knowledge whether or not the effect of any change is more likely to be damaging, relatively more damaging to the Atlantic Coast Line, or to the Florida East Coast? A. No, sir.

Q. Do you know when that case is likely to be completed? A. No.

Q. Were you present at the argument before the Interstate Commerce Commission in January, 1948? A. No, sir.

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Q. Did you read the record? A. I possibly read parts of it. I don't recall now.

Q. Did you read Commissioner Aitchison's comments that lawyers and witnesses who testify in reorganization proceedings ought to be subpoenaed and required to be present during rate cases? A. I would be very glad if one side would retain me in a rate case. We have had experience in rate revision cases.

Q. Do you think if that would happen, that you would be better able to forecast the income of the Florida East Coast Railway, if internally reorganized? A. Oh, if that were the case, I might want to revise my estimated normal up or down, depending on the results of the case.

The Court: We will suspend here now.

(Witness temporarily excused.)

. . . And thereupon Court adjourned to be reconvened at two o'clock p. m., Tuesday, January 11, 1949.

. . . And at two o'clock p. m., January 11, 1949, Court reconvened pursuant to adjournment of the preceding session, and the following further proceedings were had:

Mr. Bourne: Shall I proceed, your Honor?

The Court: Yes.

Mr. Bourne: Your Honor, I offer in evidence for a limited purpose of having the record disclose what was distributed at the time of the re-argument before the Commission in January, 1948, the following papers which were distributed by counsel for the Lynch interests:

1. A sheet entitled "Florida East Coast Railway Company, freight tonnage and revenue, 1939-1947."

The Court: For the purpose of showing what the Commission had before it to consider?

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Mr. Bourne: Yes, sir. I am not accepting the calculations myself.

Mr. Milam: The first one, do you mean?

Mr. Bourne: I am offering them one by one.

Mr. Milam: You are now offering the first one?

Mr. Bourne: I am now offering the first one.

Mr. Milam: May we look at these other ones now?

Mr. Bourne: Yes. Mr. Milam asked me if he might look at the other ones at the same time, and it seems to me that might expedite matters.

Mr. Bourne: Your Honor, Mr. Milam—there are ten of those documents stapled together. Mr. Milam has been over them and I will offer all ten, and suggest that Mr. Halter—if they are admitted—that Mr. Halter mark them, and I not read into the record, the balance, which are rather long, at this time, and he can insert the balance in the record.

The Court: You are offering them all as one exhibit?

Mr. Bourne: I would rather have them numbered separately, because I want to ask about them separately. I am offering all ten.

Mr. Milam: We object to none of them except Number 7, entitled, "Net available for interest, adjusted for nonrecurring items, year 1947".

The rest of the figures are evidently computations from records, the sources of which are indicated. That is evidently based on somebody's estimate. Whose it is, does not appear. Someone's computation, I think, if it is simply offered to show that it was before the Commission. I have no objection.

Mr. Bourne: It is offered because it was before the Commission, having been handed to the Commissioners by either you or Mr. Oliver, Major Fred Oliver, and that particular estimate is referred to in the report of March 25, 1948.

The Court: There is a great deal of difference in offering it to show what the Commission had and considered as

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the basis of its opinion of value and so on, and offering to prove, independently, now, that so and so is true.

Mr. Bourne: I am not offering it for proof of what is true now. I merely offer it for proof of what counsel for the Lynch interests asserted on the argument of March 25, 1948.

The Court: I think you can offer these for the purpose of showing that the Commission passed on those matters before them and made the report that they did.

Mr. Bourne: That is all.

Mr. Milam: Then, in one important matter, the Commission took an exhibit, handed up by counsel and treated it as evidence when there was no basis in the record for it. That has to do with the prices they paid for the bonds and whether they sold bonds at a profit and all of that. All of this is by what, is by way of argument before the Commission. This was never offered in evidence before the Commission. It was a memorandum of argument upon which argument of counsel was based; as a memorandum for oral a gument. In that respect it is before the Commission and in no other respect, and, not part of the evidence.

The Court: That is what I understand was the purpose of his offer. Not to prove anything, independently, but to show what the Commission had before it on the contentions that are now offered.

Mr. Bourne: I also intend to ask Mr. Gordon what part his firm played in the preparation of these documents.

The Court: That is cross examination.

Mr. Milam: So long as showing it is a part of the argument of the Lynch counsel, I have no objection.

The Court: That is the reason I am admitting it, to show what the Commission had before it. The contention the Commission had before it.

Mr. Milam: Precisely.

. . . The instruments last above referred to were received and filed in evidence and marked Inter-

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vener, Atlantic Coast Line Railroad Company's Exhibits 1 to 10, inclusive.

Mr. Bourne: There are some additional ones and I think I can save time by showing them to Mr. Milam now, too.

Mr. Bourne: I offer those in evidence, subject to this qualification: That Mr. Milam doesn't recognize these papers. I found them in a folder in Mr. Howell's office. I believe that they were offered by either Mr. Milam or Major Oliver, but I would like to check that further, later on——

The Court: No, you had better check that before you offer them. Because, you do not know where they came from.

Mr. Bourne: I am under this handicap. The material is at Mr. Howell's office. I can go ahead and make the examination.

Mr. Milam: May I make this observation? Anything that happened in the argument, or anything that happened that appears in the current proceedings in the minutes before the Commission, is part of the record here.

Mr. Bourne: That is not really correct. References are made in the argument to papers that were handed to the Commission.

The Court: I do not know about that, but, you offer the papers, and you should advise us so we know what they are.

Mr. Bourne: I withdraw the papers and will get the minutes of the argument.

Mr. William A. Gordon, having been previously produced and first duly sworn as a witness on behalf of the Intervener, S. A. Lynch, was recalled to the witness stand and further testified as follows:

Further cross examination by Mr. Bourne:

Q. Mr. Gordon, I show you Atlantic Coast Line Exhibits 1 to 10, inclusive, which were just offered, and I ask you

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whether they were prepared by you or by anyone in Coverdale and Colpitts? A. These are exhibits that were all prepared in our office. I believe that in the case of one exhibit, that we reproduced it, but that it was a combination of—that the preparation was joint as between the lawyers and myself. I am referring to Exhibit No. 7. In other words, they requested us to prepare this exhibit, and, as I recall it, it was prepared jointly in consultation with counsel.

Q. Now, isn't, in a general way at least, the subject matter covered by Atlantic Coast Line Exhibit No. 1, the first of the documents which have just been marked, similar to the subject matter covered by your Exhibits 2 and 3, which were introduced on your direct examination? A. Well, only partially because Exhibit 2, in the present proceeding covers other railroads besides the Florida East Coast. Furthermore, on Atlantic Coast Line Exhibit No. 1, the year 1947 is estimated, whereas on Lynch Exhibit No. 2, in this proceeding, the year 1947 is actual.

Lynch Exhibit No. 2 also covers a little more information because it gives figures on the originated tonnage and terminated tonnage, as well as revenue tonnage carried.

Q. Well, would you state the relationship between Atlantic Coast Line Exhibit No. 2, which was introduced in the January, 1948 hearings, and Lynch Exhibits 4 and 5, which were marked today? A. Lynch Exhibits 4 and 5, only the years 1940 and 1947. They show figures for other railroads in the Southern Region, besides the Florida East Coast. Whereas, the Atlantic Coast Line Exhibit 2 shows figures for the Florida East Coast Railway only by years from 1939 to 1946, with an estimate of 1947.

Q. You testified, did you not, that for the purpose of the Lynch Exhibits which were introduced today, you took 1940 as the base year? A. That is correct.

Q. Doesn't it appear that in these exhibits, the Atlantic Coast Line Exhibits which were introduced at the January, 1948 hearing, by counsel for the Lynch Interests, that the figures started with 1939? A. That is true.

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Q. Have you any present recollection as to the reason for the selection of the year 1939 for use last January? A. My recollection was that at that time they showed both '39 and '40 as being two pre-war years.

Q. I think it is correct that in some of these years, the average is '39 and '40? A. Yes, and very often, of course, one year might be out of line or not quite normal. However, as far as these figures are concerned, the use of—if I had used 1939 in my present exhibits, I would have shown substantially greater increases for the Florida East Coast. That is perhaps besides the point, but the only reason—a direct answer to your question, and that is, if anything, those two years were pre-war years, yes, sir.

Q. Referring to that subject, Mr. Gordon, have you made any study to ascertain whether the increased traffic, due to defense industries and preparation, war preparedness, affected the Atlantic Coast Line earlier than it did the Florida East Coast, or vice versa? A. No, I haven't.

Q. If in point of fact, the Atlantic Coast Line income or revenues increased in 1940, relatively more on account of defense preparations, wouldn't that have the result of having a larger base for the calculation of the Atlantic Coast Line percentages and to that extent reduce—and to that extent produce a distortion? A. Assuming what you——

Q. My question is purely hypothetical. A. Yes, under that assumption, obviously that would be true. But, of course, the principal reason for selecting the year 1940, in my exhibit here was that it is the last year that the Commission had for the Florida East Coast, and these exhibits are directed primarily at the Florida East Coast. The other figures are shown for the Atlantic Coast Line and other roads, generally, and simply are as a matter of comparative information so as to enable a comparison of the growth of the Florida East Coast with other railroads. In 1939, it would show an even greater percentage for the Florida East Coast.

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Q. Would you state for the record, just to clear things up, that the relationship between the Atlantic Coast Line Exhibit No. 8, which was one of the exhibits introduced in January, 1948, and Lynch Exhibit No. 17, which was introduced this morning? A. Atlantic Coast Line Exhibit Number 8 shows a comparison of the population in 1930-1940. As of January 1, 1947, also. Whereas, Lynch Exhibit No. 17 is a comparison of the population in 1940, and as of January 1, 1948. The other difference in the exhibit is that the ACL Exhibit No. 8 includes three counties more than the Lynch Exhibit No. 17. Because of the abandonment of the Okeechobee Branch, there were three counties which the Florida East Coast no longer served, which were formerly served by the Florida East Coast, but, no longer served by them after 1947.

Q. Would you state the relationship between the Atlantic Coast Line Exhibit No. 9, which was introduced in January, 1948, and the Lynch Interests Exhibit No. 13, introduced this morning? They both relate to, do they not, increase in land in farms? A. That is correct. ACL Exhibit No. 9 shows the acreage for 1930-40, and 1945. Whereas, the year 1940 is not shown on exhibit, Lynch Exhibit No. 13.

The principal difference in the exhibits is that in Lynch Exhibit No. 13, it excludes three counties which are no longer served by the Florida East Coast Railway.

Q. Would you similarly state the relationship, in general terms, because there a number of differences between ACL Exhibit No. 10 and Lynch Exhibits 20 and 21, and any others that deal with the same subject matter? A. Mr. Bourne, I think the only way to do that is to go through it, item by item, because there are three exhibits, and it is a little difficult to——

Q. Well, is it a fair statement that the two—the ones that I mentioned, undertaking to deal with the same general subject matter, but used different factors? A. A number of the factors are the same. In fact, I think a good many

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of the factors are the same, but Exhibits 16, 20 and 21 bring the figures more closely up to date than the ACL Exhibit No. 10.

For example, in the first item, population, ACL, Exhibit No. 10, shows the population as of January 1, 1947, whereas the Lynch Exhibit No. 20 shows the population as of 1948.

The second, being income, ACL Exhibit 10, shows the figures as of 1946, whereas the Lynch Exhibit No. 20 shows them as of 1947.

Now, generally speaking, that runs all the way through. For example, on total income payments to individuals, ACL Exhibit No. 10, shows 1945, whereas the Lynch Exhibit No. 20 shows 1947, so that generally speaking, many of the factors are the same, but they have been brought more closely up to date in the latest exhibits.

Q. Now, I show you this group of papers that are clipped together, and I ask you whether you recognize them? A. No, sir, I do not.

Q. You are unable to say whether or not you had anything to do with their preparation? A. I am quite sure that I did not prepare them.

The Court: Well, is that all of the cross-examination?

Mr. Bourne: On that point, yes, sir.

By Mr. Bourne:

Q. Mr. Gordon, I show you Lynch Exhibit No. 10, and ask you whether or not, if an effort be made to forecast the income of the Florida East Coast in the next five years, it is not much more significant that the rail tonnage of the Florida East Coast Railway declined in 1947 as compared with 1946, and that the truck tonnage very substantially increased in 1946 to 1947, even though the percentage of increase of the rail tonnage of the Florida East Coast Railway in 1947 over 1946 is higher than the percentage increase of the truck tonnage? A. I am not at at all sure but that is so, Mr. Bourne, but for these reasons:

In the first place, the truck tonnage during the war period was—trucks did not have anything like the growth

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that the rails did during the war period. In the second place, the Florida East Coast Railway was quite hard hit in 1947 by the freeze and floods that had a definite bearing on the 1947 rail tonnage.

Q. Well, doesn't your Exhibit No. 11 show that there has been a steady and substantial decrease in the movement by rail of Florida fruits and vegetables in the last season? Conversely, at the same time, there has been a steady and substantial increase of movement by truck? A. That is right. And that bears out what I said about during the war years. During the war years trucks were not available. Trucks were being made for military purposes and were not available for commercial use, and the railroads got all that business. Obviously, there has been a decrease in the rail business since the war period. That is one reason for not using the rail earnings of the war years as a medium for earnings. That is one reason we go to the post-war period.

Q. Well, when you go to the post-war period, in this instance, you find a steady decrease over three seasons of the movement by rail, and a steady increase in movement by truck? A. Well, of course, you have only really two seasons here, Mr. Bourne, because in 1945-46, the war was still on.

Q. Let us keep it—— A. You have a decrease from 72.1 to 66.6.

Q. Well, is it your judgment that there is going to be a stabilization or a reversal of that trend, or, are you simply making a statistical preparation? A. Well, I think the rails should be able to hold their own against the trucks. Now, obviously, with increased freight rates, the trucks have got more business. And, on the other hand, there are certain rail rates that have been held down to meet that competition.

Q. Well, you recognize, then, I take it, the intimate relation of both freight rates and truck rates as fixed by the Interstate Commerce Commision—? A. Yes. sir.

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Q. —on any estimate? A. That is true.

Q. Now, would you look at your next Exhibit 23, please? A. (Examining paper.)

Q. That is entitled, "Statement of estimated cash required for extraordinary additions and betterments and improvements subsequent to 1948." You testified, did you not, that your starting point were the original figures, estimated cost of the rehabilitation and improvement program? A. No, I started with Exhibit 96 which was a revision of the original estimate. You will recall that the exhibit——

Q. I did not mean to be confusing about that. I mean, the original figures that were the basis of the Commission's report of April 8, 1947? A. I think that is correct, but just to make the record clear, the original estimate appeared in Exhibit No. 72.

Q. That was in 1944, wasn't it? A. Yes, that was April 18, 1944, and subsequent to that, the figures were revised and on October 12, 1945, just prior to the November hearing, the figures were revised and adjusted as shown in Exhibit 96.

Q. I did not mean to be confusing. Original, to me, might mean original in the sense they are unchanged figures which form the basis of the reserves provided in the plan of April 8, 1947. A. I think that is right.

Q. You have not taken into account, any increase in cost of the things which that program contemplated, have you? A. No, sir.

Q. And you know, of course, rail laying on October 1, 1947, and the exhibit, I believe, to which you referred, indicate that the costs would actually be very much greater, at least as to some of those items, isn't that correct? A. I don't recall referring to any exhibit.

Q. Well, I will rephrase my question. In your discussions with the Trustees' staff, or other sources, have you not ascertained that the cost of the incomplete portions of the rehabilitation program would be much greater than was

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originally forecast? A. Well, I haven't discussed that matter with the Trustees or the officers at all, but I am not surprised. I would expect that these costs would be up, because of increased wage rates and increased material prices. Assuming, of course, that they are contemplating carrying out this improvement program. Of course, new stations and terminal facilities, as they were set up in Exhibit 96, provided that by the end of 1948, they would have spent some two million dollars. Actually, they haven't spent anything on it. I am not at all sure that in view of the decrease in passenger business, that they are justified in making any expenditure.

Q. You are not undertaking, on behalf of the Lynch interests, to request a change in the plan provisions, in that respect, are you? A. No, sir, I am just putting out a red flag that they ought to look it over again.

Q. Now, does this Lynch Exhibit No. 23 take into account any additions and betterments not provided by the rehabilitation program? A. No, sir. No, sir, it is the extraordinary program only.

Q. And you know, of course, that those have been very substantial already, do you not? A. Oh, yes.

Q. And that same exhibit provides for financing out of equipment depreciation over a period of years? A. I am not sure. I have to look.

Q. Well, in making your calculations in Exhibit 23, you take into account depreciation accruals over how many years? A. Ten years.

Q. What were the Commission's calculations on that? Do you remember? A. Well, as I recall, they set up a program for either four or five years. Most of which have already gone by.

Q. Now, would you look at your Exhibit No. 27, please. That contains figures, does it not, in which you have calculated the adjusted net available for Federal income taxes and fixed charges for the years 1946, 1947 and 1948? A. That is right.

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Q. In 1947, how much of the adjusted net was actually reported net, and how much of it comprised your adjustment? A. Well, 1947, the actual reported net was only $297,000.00. The adjustments made up the balance, $2,225,000.00.

Q. In other words, the aggregate of the adjustments was nine times or so, the actual reported net, is that right? A. That is correct. Because, the largest item in that, of course, is the non-recurring expense items which aggregate over two million dollars, made up principally of the Okeechobee Branch retirement, the rail re-laying program and other items.

Q. Well, now, I call your attention to ACL Exhibit—I will withdraw that. And, what is the adjusted net figure for the year 1947 as set forth in the exhibit which you produced today? That is $2,522,000.00, isn't it? A. Yes, sir.

Q. Now, I show you Atlantic Coast Line Exhibit No. 7, which was handed up to the Commissioners on January 7th or 8th, 1948, relating to the same year and showing that the adjusted net available for interest was $3,644,000.00, and I ask you to state in your own words, your opinion of that calculation? A. Well, of course, this ACL Exhibit No. 7, in the first place, is an estimate. You will notice in the first item, estimated net available for interest, is shown as $163,000.00, whereas the actual, as shown on Exhibit No. 27, was $297,000.00.

Some of the other estimates in there, furnished by the Trustees were found to be somewhat different when the actual figures came. For instance, on the set charges to operating expenses, on the rail program, the Trustees estimated that at $948,000.00, and when the actual figures came through, they were only $894,000.00. Likewise, in the charges to operating expenses on account of the Okeechobee Branch retirement. That was somewhat estimated.

That estimate, deferred maintenance made up, was the same, and the estimated set traffic loss due to freezes, hur-

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ricanes and so forth is the same as is the estimated cost of restoration on account of the flood damage.

In my Exhibit No. 27, I did not exclude amortization charges for the defense projects. I probably should have done that, but the amount was relatively small and we did not have the basis for separating that between the amounts which would normally be charged to depreciation and the accelerated amount, because of the amortization feature.

So far as all of those items are concerned, they agree substantially with my exhibit, Exhibit No. 27.

Now, the difference comes about, primarily, in the adjustments for rates and fares, wage rates, materials, prices and taxes. At the time that the ACL Exhibit No. 7 was made, information was not available to make a close estimate of the effect of those items.

Q. The net difference is $1,022,000.00. That is the difference between $2,522,000 and $3,644,000, isn't it? A. That is correct.

Q. I will ask you as an expert whether, if this case should have to go back to the Commission and then were to come back to the Court again later, there is any reason, based on past experience with these estimates presented by the Lynch interests, why there would not be an adjusted income for 1948, of $1,022,000 less than is shown by your Exhibit No. 27, the point of my question being whether there are any difficulties about making an estimate in January, 1948, relating to the year 1947, that do not apply equally to the making of an estimate in January, 1949, for the year 1948? A. Well, there is quite a difference in the two situations. These figures in ACL Exhibit No. 7 were put together on the basis of the best information that was available to counsel and to ourselves in New York at that time.

With respect to the estimate for 1948, contained in Exhibit No. 27, that estimate is based on eleven months actual and one month estimated, and furthermore, we had

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the benefit of consultation with the Trustees and their officers with respect to the 1948 situation.

Q. In making adjustments in Exhibit 27, with respect to hurricanes and floods, those adjustments consisting of both expense items and revenue items,—loss of revenue—did you assume that you could exclude all effects of hurricanes and floods, or did you assume that you could exclude all except what might be normal hurricanes and floods? A. Well, of course, the large decreases in there are because of the floods resulting from the mere hurricanes and the freezes.

Now, what you might call normal hurricanes unless there are floods, there is very little damage to the property, and very little loss of traffic. But when you get freezes and floods, then you have substantial changes.

Now, in 1946, there were no adjustments necessary. The adjustments for 1948 were relatively small. The large adjustment is in 1947.

Q. Well, is it your testimony—in making forecasts of future earnings of railroads, it is customary in this part of the country to assume that you will have no hurricanes and floods? And it is customary in the northwest, and New England to assume that you have no blizzards? Is it customary to assume in the Mississippi Valley that you have no high water? A. Well, I would say that it would be customary here, or I would think it would be fair to assume here, that you would have hurricanes but that normally you would not have severe floods or freezes. It would be abnormal when you would have it.

Mr. Bourne: That is all.

The Court: Are there any further questions from anybody else?

Mr. Walton: If your Honor please, I have one or two questions I would like to ask.

The Court: Proceed.

Cross examination by Mr. Walton:

Q. I believe that you referred to the Commission's estimate of $1,268,000.00 as representing the normal annual amount of money available for interest in the average year as having been forecast in the report of April 6, 1942? A. I don't recall that I referred to the specific date, but it is based on testimony which was offered at the 1941 hearings.

Q. And included in one of the 1942 reports? A. I will take your word for that.

Q. Do you recall that in the second supplemental report of the Commission, that the same figure was the starting point of the Commission? A. $1,268,000?

Q. Yes. A. I don't recall, specifically, but——

Q. If you will look at page 561 of the printed report. A. (Examining report.) Yes.

Q. Do you recall that in that report, the Commission then assumed that there would be a two hundred thousand dollar annual savings in the operating expenses growing out of the abandonment of the Okeechobee Branch and the construction of the Fort Pierce cut-off? A. Yes, sir.

Q. Adding those two figures together, does that not give you a total of $1,468,000 by way of estimate of the future average year? A. Yes. I had in mind the figure of $1,500,000.

Q. Well, the figure of $1,500,000 is the one actually adopted by the Commission, is it not? A. Yes, and I assumed it is based on the language you have just been referring to.

Q. Do you recall that in the same report, the Commission also made the statement that economies in operating expenses should also be realized, increased Diesel engine operation of trains and in equipment rental by purchases of additional streamlined passenger cars? A. Yes.

Q. Is it fair to say that the effect of that report there was to allow only $32,000.00 additional average estimated

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income as being the effect of those items? A. It would seem so.

Mr. Walton: Thank you.

Redirect examination by Mr. Milam:

Q. Mr. Gordon, you testified that your partner, Mr. Kennedy, testified in 1944 in this case, and that you testified in 1945? A. Yes, sir.

Q. What was the figure used at that time as gross operating revenues of the railway in a normal year? A. $12,550,000.

Q. Do you recall what the Receivers' estimate was for income of a prospective normal future year? Gross revenue? A. My recollection is that it was about $12,300,000. It was very close to the figure that Mr. Kennedy and I used.

Q. Then the Receivers' estimate of $12,300,000 and the Coverdale and Colpitts estimate of $12,550,000 was the estimated gross revenue testified to before the Commission in the early stages, preceding the 1942 report—excuse me; preceding the 1945 report? A. May I have that question read back?

. . . The question was read.

Q. Let me reframe the question. You made, or your firm made a survey leading up to the estimated $12,550,000, did you not? A. Yes, that is the estimate that Mr. Kennedy made.

Q. What year was that estimate given? A. 1944.

Q. Do I understand that prior to that time, the Receivers' estimate was $12,300,000? A. Yes, sir.

Q. Do I understand that for the three post-war years, that the gross revenue has averaged between 27 and 28 million dollars? A. That is correct.

Q. Then, the actual revenue in the three post-war years is about two and one quarter times the estimated revenues of $12,300,000 and $12,550,000 estimated? A. That is right.

Q. Do you know whether or not Mr. Kennedy largely followed the Receivers' estimate and made some adjustments or not? A. My recollection is that he pretty well followed the Receivers' estimate, but that he made some adjustments in connection with passenger revenues.

Q. Then, since the time of the Receivers' estimate, until you testified today, has there been, before the Court or Commission, an estimate of traffic and gross revenue and net revenue based on a detailed study such as you have made for this hearing? A. I believe not. I think—I am quite sure that all of these estimates were based on the Receivers' estimate which was made early in 1941.

Q. Getting back to your 1945 testimony—you know what that was based on, don't you? A. Yes, sir.

Q. Did you take Mr. Kennedy's estimate, which in turn was based on the Receivers' estimate, as a basis at that time? A. I did.

Q. Did you make an independent study or survey? A. Not as far as traffic was concerned. We had just, a few weeks, after we were retained in the proceeding, before the hearing came up.

Q. Yes. A. And we assumed that Mr. Kennedy's estimate was correct, which was about the same as the Receivers' estimate, and the adjustments which I made in my testimony, related to savings because of capital expenditures and other changes in operating expenses. The next time I think we should all realize that the war was going on and there wasn't any firm foundation for a post-war figure, and there wasn't much of any justification.

I think we all felt that the traffic which had been estimated by the Receivers, was a reasonably good estimate, in the light of the conditions at that time. Mr. Kennedy adopted it, and I adopted it.

Q. Then, is it fair to state that both you and Mr. Kennedy adopted the pre-war estimate of the Receivers until post-war actual performance gave you another basis? A. That is correct.

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Q. Then, any computation or table that you prepared or helped to prepare with respect to the 1948 hearing before the Interstate Commerce Commission, was based upon this estimated gross revenue—no, strike that. Then, do I understand you, that you did not consider it practicable to make a post-war estimate until there had been some performance? A. Well, I felt that it would be for—well, I felt that we would be on much firmer ground using the actual three years post-war experience.

The Court: Can't we get along now with some of the other witnesses?

Mr. Milam: Your Honor, I think that concludes my questions to this witness.

The Court: All right. You may go down.

(Witness excused.)

Mr. Milam: Is Mr. Jackson in the room? Will you take the stand?

Mr. Bourne: I think this is a suitable time for me to re-offer the papers.

The Court: Do you know what they are?

Mr. Bourne: I checked them against the minutes of the hearing, and I think they were handed up by Mr. Milam or Major Oliver, counsel for the Lynch interests. All of them were offered in the argument by Major Oliver.

Mr. Milam: I haven't checked the record on that. We can do that in a few minutes. If you will give them to Mr. Scott, I am sure if that is the fact, there will be no objection to it.

Mr. A. A. Jackson, having been produced and first duly sworn as a witness on behalf of the Objector, Lynch Interests, testified as follows:

Direct examination by Mr. Milam:

Q. State your name and connection with the Trustees of the Florida East Coast Railway, here? A. A. A. Jack-

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son. I am assistant to the Trustees, at St. Augustine, Florida.

Q. At the request of the Lynch Interests, did you cause to be prepared a mimeographed copy of a September 30th, 1948 balance sheet? A. I did.

Q. Have you a copy of it here? A. Yes. (Tendering counsel paper.)

Mr. Milam: We will introduce it in evidence.

The Court: Is there any objection?

Mr. Thomson: No. May I see that?

The Court: It is a balance sheet, as far as you know? A. Yes, prepared in the accounting offices.

> . . . The instrument last above referred to was received and filed in evidence and marked Objector, S. A. Lynch interests' Exhibit No. 28.

Mr. Milam: That is all with this witness.

Mr. Thomson: Is this all of the testimony that you are going to take in connection with this particular balance sheet?

Mr. Milam: Yes.

Mr. Thomson: Are you going to introduce this particular balance sheet?

Mr. Milam: Yes, but not at present.

Mr. Thomson: Will I have an opportunity to question this gentleman?

Mr. Milam: Yes.

Cross examination by Mr. Thomson:

Q. Mr. Jackson, I hand you Lynch Interests Exhibit 28, and I ask you to look at the liabilities side of your balance sheet and you will note there that you have listed an item of $3,811,000.00 in the nature of first mortgage bonds which have been purchased by the Trustees, and I ask you how you classified them in that balance sheet? A. I can't answer that. You will have to ask the chief accounting officer.

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Q. Well, did you have anything to do with the preparation of this balance sheet at all? A. No, sir, the chief accounting officer prepared it.

Q. Are you familiar at all with the balance sheet of the Florida East Coast Railway Company? A. Except as prepared by the chief accounting officer.

Q. Well, are you familiar, Mr. Jackson, with the fact that Judge Strum made an order in 1945 to the effect, and I quote, "All First Mortgage Bonds purchased pursuant to this order, together with all coupons thereunto belonging, shall be purchased for the account of and in the interest of the holders of the First and Refunding Five Per Cent Bonds, Series A of Florida East Coast Railway Company, and the purchase of said First Mortgage Bonds and coupons shall not be deemed to be a payment thereof, but the same shall be kept fully alive, and shall, subject to the further order of this Court, be held by the Trustees under an express trust for the pro rata benefit of the holders of the First and Refunding Mortgage Five Per Cent Bonds, Series A, of the Florida East Coast Railway Company, without diminution of the rights of the said securities. The holders of the First and Refunding Mortgage Five Per Cent, Series A, Florida East Coast Railway Company shall be, and they hereby are subrogated to the extent of their respective pro rata interest in said funds, to all of the rights and interests of the First Mortgage bonds so purchased, in so far as it may be necessary to completely protect the rights and interests of the holders of said First and Refunding Mortgage Five Per Cent bonds, Series A, of the Florida East Coast Railway Company. All First Mortgage bonds of the Florida East Coast Railway Company, and coupons thereunto belonging, so acquired by the Trustees shall be entitled to the same rights and shall be given the same treatment in any plan of reorganization as other First Mortgage bonds of the same issue and series not acquired by the Trustees or accorded in any such plan."

A. A. Jackson, for Objector—Cross.

Mr. Thomson: I won't read you the entire proposition on it, but I believe this is quite germane to the matter now pending before you, to pay the bonds. I merely want to ask another question of this witness. In the light of this order, which I understand has not been appealed, and which is part of the record of this case, the $3,811,000 worth of First Mortgage Bonds which are now held by the Trustees, can not be considered as having been cancelled and the issue of the twelve million dollars of the First Fours can not be considered as having been purchased in that amount of $3,811,000. Do you agree?

Mr. Bourne: I object to that as calling for a conclusion.

The Court: I suppose you better argue that to the Court rather than the witness.

Mr. Thomson: I merely want to make a record. I represent the Trustees of the First and Refunding Fives and, as I read the order of Judge Strum, there is exactly $3,811,000.00 par value of the First Fours, which may be held by the Railway Trustees, but, if they are held by them, they are only held in trust for the benefit of the First and Refunding Five's.

The Court: They are not assets.

Mr. Thomson: They are not assets, and have not been cancelled——

The Court: That is a law question.

Mr. Thomson: Yes, your Honor. Do you uphold the objection, your Honor?

The Court: Not the objection, it is merely a suggestion.

Mr. Thomson: Mr. Bourne objected and I took your Honor's statement to mean that the witness can not answer the question.

The Court: Unless it is made in greater detail.

Mr. Thomson: I will suspend the examination here. Come down.

(Witness excused.)

Mr. Milam: Now, if your Honor please, with respect to the last exhibit, 11 to 15, of the Coast Line, just under discussion, we have verified from the record that they were commented upon by Major Oliver, and undoubtedly passed around——

The Court: For the same purpose, and under the same ruling?

Mr. Milam: For the same purpose and under the same ruling.

> . . . The instruments last above referred to were received and filed in evidence and marked Intervenor, Atlantic Coast Line Exhibits Numbers 11 to 15, inclusive.

Mr. James J. Keller, Jr., having been produced and first duly sworn as a witness on behalf of the Objector, S. A. Lynch Interests, testified as follows:

Direct examination by Mr. Milam:

Q. Will you state your name and residence, please? A. John J. Keller, Jr., Miami, Florida.

Q. What is your business and occupation? A. I am a certified public accountant with the firm of Pitman, Penland, Purvis, Keller & Company.

Q. How long have you been a certified public accountant? A. Twenty years.

Q. Practicing in the State of Florida? A. Yes, sir.

Q. You do not, I assume, specialize in railroad accounting? A. I do not.

Q. At the request of the Lynch Interests, did you go to the East Coast offices in St. Augustine and go into the records and consult with the officers of the Trustees and make certain tabulations for use at this hearing? A. I did.

Q. Mr. Keller, will you produce the first of these tabulations and comment upon them? A. The first comparative

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balance sheet showing the assets and liabilities of the Railway Company at December 31, 1947, as compared with December 31, 1940, and the increases and decreases which have taken place in those accounts.

The second is the liabilities for the same dates, also showing increases and decreases which have occurred in those accounts.

Q. You make certain exclusions at the head of the first sheet. What are those, and why? A. These accounts were taken from the published reports of the railroad at the reports to the Interstate Commerce Commission and adjusted to reflect the interest of the First and Refunding Five per cent bondholders. In other words, we have eliminated the interest accrual and the amortization of the discount of the funded debt since December 31, 1940.

Mr. Milam: That, your Honor, is offered in evidence.

> . . . The instrument last above referred to was received and filed in evidence and marked Objector, S. A. Lynch Interests' Exhibit No. 29.

By Mr. Milam:

Q. On the second sheet, I believe you show an increase in earned surplus of $30,018,502 in that seven year period? A. That is correct.

Q. Now, what is the second schedule or exhibit that you prepared? A. A consolidated income and earned surplus statement for the period January 31, 1941, through December 31, 1947.

Q. I note that your $30,000,000 item of net additions to surplus, ties in with the previous exhibit? A. It does. It is perhaps pertinent at this point to know that there might be an adjustment to that figure of a little more than nine hundred thousand dollars, due to change in accounting rules that was made by the Interstate Commerce Commission in 1942, which had the effect of reclassifying the surplus from donations and grants and making it a reserve

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to accrued depreciation, so that the next to the last figure on this exhibit of $2,251,928, must be adjusted by $905,460.00, with a like amount increase in the earnings for the seven year period.

Q. Well, then, but for that change in accounting rules of the Interstate Commerce Commission, effective in 1943—? A. That is right.

Q. The net addition to surplus would have been some nine hundred thousand dollars more? A. That is correct.

Mr. Milam: This is offered in evidence.

> . . . The instrument last above referred to was received and filed in evidence and marked Objector, S. A. Lynch Interests' Exhibit No. 30.

By Mr. Milam:

Q. Your next exhibit also, will you produce it, and comment on it? A. The next exhibit is headed "Income available for fixed charges and income taxes by years, 1941 through 1947—" and bears the notation, "Adjusted to eliminated penalty interest on unpaid interest on First and Refunding Five Per Cent bonds accrued in 1943 for 1942." Perhaps I could make an explanation of that item by saying that in classifying that particular interest, it was deducted in the income expense statement for the amount available for fixed charges, so that the effect of this adjustment is to eliminate that, including the amount available for fixed charges.

Q. Without going into detail, you know that some settlement has been made on the income taxes? A. That is correct.

Q. In that exhibit, the total of income available for fixed charges is thirty—thirty-six million, three hundred and fifty-five dollars? A. That is correct.

Q. Does that tie in with the figure on the previous exhibit? A. It does, in the middle of the page on Exhibit 30.

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Q. On Exhibit 30? A. It does.

Mr. Milam: We offer this exhibit in evidence.

. . . The document last above referred to was received and filed in evidence and marked Objector, S. A. Lynch Interests' Exhibit No. 31.

By Mr. Milam:

Q. Will you please produce your next exhibit and comment upon it? A. The next exhibit is headed "Increase in Net Worth from December 31, 1940 through December 31, 1947"? It is a statement intended to show how the earnings of $30,018,502 were applied or used.

Q. I see. Now, I notice there is a figure of $30,018,502 there. Does that tie in with that same figure in the income and earned surplus statement? A. It does.

Q. Now, I believe there is a donations and grants item that you mentioned a while ago? A. That is correct, and if effect was given to that, the figure would be $30,923,962, and the donations and grants item, the earnings would be reduced by the same amount, and would be $24,585.00, and by subtraction you arrive at the same figure that is shown on the exhibit.

Q. Perhaps it would be well to explain to the Court that $4,500,000 net deduction in interest, in default on First and Refunding bonds. Was that money that was paid as interest coupons on these bonds? A. Yes.

The Court: How many coupons were paid?

Mr. Milam: Four were paid, but I understand that $4,500,000 was set up as a debit to surplus, and when it was paid off, it is treated separate to that amount. Is that correct? A. No.

By Mr. Milam:

Q. Will you explain it then? A. Well, it simply a statement showing what was done with the earnings, and $4,500,000 were applied to the payment of the coupons.

Mr. Milan: We offer it in evidence.

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. . . The instrument last above referred to was received and filed in evidence and marked Objector, S. A. Lynch Interests' Exhibit No. 32.

By Mr. Milam:

Q. Will you produce and comment upon the next exhibit? A. The next exhibit is headed, "Cash Reserved from Income and Surplus through Media of Depreciation, Amortization of Defense Projects and Retirement charged against Income and Surplus and Remainder of Cash so Reserved after Applying Down Payments on Equipment financed and Installments paid on down—paid on equipment obligation, years 1941 through 1947."

The exhibit refers to the fact that cash was accumulated because earnings are charged with such depreciation and amortization of defense projects and to show, in addition, what would remain out of such depreciation reserves after deducting the down payments on the equipment obligation, instalments paid during this period.

Q. In other words, that reflects something that actually has happened in the past? A. That is correct.

Q. I note under the fifth column, 1945, you have an item, amortization of defense projects, $1,238,306. Will you explain that? A. My understanding is that year the Interstate Commerce Commission gave railroads permission to charge off all accumulated amortization on defense projects that had not yet been written off.

Q. Well, did that become a debit against income or not? A. It did.

Q. Do you know what the defense projects were, mostly? Building the locomotives or what? A. Well, any sort of equipment that was used or acquired for defense activities and military activities.

Q. You don't know specifically about that? A. I do not.

Mr. Milam: We offer the exhibit in evidence.

. . . The instrument last above referred to was received and filed in evidence and marked Objector, S. A. Lynch Interests' Exhibit No. 33.

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By Mr. Milam:

Q. The last exhibit now, I think, appears sufficiently from the balance sheet received in evidence and we will not offer it in evidence. A. Yes, sir.

Mr. Milam: I tender the witness for cross-examination.

Mr. Bourne: I have no cross-examination.

The Court: I want to ask a question this last sheet. On the bottom here, you have shown ACL, free cash available, September 30, 1948, $14,637,000. A. Your Honor, I don't believe that was offered by us.

Mr. Milam: Explain it.

The Court: What does it mean?

A. I don't happen to have it before me at the moment.

The Court: If you were not responsible for it, I won't ask the question.

Mr. Milam: Come down, Mr. Keller.

(Witness excused.)

Mr. Milam: That is all of the testimony in favor of the Lynch Interests, your Honor.

The Court: Who takes the floor next?

Mr. Walton: Your Honor please, I would like to put a witness on the stand.

The Court: All right.

Mr. Edward N. Claughton, having been produced and first duly sworn as a witness on behalf of the Objectors, Welbon and others, testified as follows:

Direct examination by Mr. Walton:

Q. Will you state your name? A. Edward N. Claughton.

Q. Where do you reside? A. Miami, Florida.

Q. Are you the E. N. Claughton referred to in the objections filed on behalf of W. G. Welbon, Gail E. Chandler,

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John W. Snyder, O. A. Statler, E. N. Claughton and A. W. Corbett? A. I am.

Q. Mr. Claughton, approximately how many of the First and Refunding Bonds—well, let us phrase it another way. Approximately what par value of the First and Refunding Bonds of the Florida East Coast Railway Company do you own? A. Approximately three million one.

Q. You mean, $3,100,000? A. That is right.

Q. Who is W. G. Welbon? A. He is a very wealthy resident of Miami, Florida. He has a good deal of real estate down there, and spends most of his time looking after his investments.

Q. Is he in any business? A. No. No, he is looking after his own real estate.

Q. Approximately what par value of bonds of the same issue does he own? A. $198,000.

Q. Who is Gail E. Chandler? A. A very successful physician or doctor down there.

Q. Does he reside in Miami Beach, Florida? No, in Miami.

Q. Does he actually practice medicine, there? A. With the firm of Palmer and Chandler.

Q. Approximately what par value amount of bonds of that issue does he own? A. $225,000.

Q. Who is John W. Snyder? A. A physician and surgeon, living in Miami Beach.

Q. Is he in active practice? A. He is.

Q. Approximately what amount, par value of bonds of that issue, does he own? A. $160,000.

Q. Who is O. A. Statler? A. One of the original hotel firm. I think he's more or less retired and lives in Miami.

Q. Approximately what par value amount of bonds of that issue does he own? A. $475,000.

Q. Who is A. W. Corbett? A. A brother in law of mine living in Miami, Florida, who operates—or, general manager for a group of theatres that we have down there.

Q. He resides in Miami? A. He does.

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Q. Approximately what par value amount of bonds of that issue does he own? A. $342,000.

Q. Mr. Claughton, I am going to ask you what your business is. Will you please state it? A. Well, it is kind of involved. Real estate, I suppose. I operate a few parking lots and develop a little real estate and invest a little bit in other than railroad securities.

Q. Mr. Claughton, or W. G. Welbon or Gail E. Chandler and John W. Snyder, or O. A. Statler or A. W. Corbett, or any one or more of you, have any financial interest of any kind or of any nature in the St. Joe Paper Company or in the duPont Estate? A. Speaking for myself, I certainly do not, and for the others, I am reasonably sure that they do not.

Q. Do you recall approximately what par value amount of bonds of the issue referred to was purchased by members of this group after the issuance of the second supplemental report of the Interstate Commerce Commission? A. What date was that?

Q. I believe that was in January, 1945. Yes, January of 1945. A. For myself, about half of what I hold. About a million and a half dollars, I would say, roughly.

Q. Did you purchase any of those from the State Deposit and Trust Company? A. $671,000.

Q. At approximately what price? A. 73. That means seventy-three dollars a hundred. $730.00 a thousand.

Mr. Walton: Your witness.

Cross examination by Mr. Bourne:

Q. Mr. Claughton, you testified, I believe, did you not, on deposition on December 10, 1948, that you owned approximately $3,500,000 of the First and Refunding Mortgage bonds? A. I think that is about right.

Q. Since that time, haven't you sold four hundred thousand? A. No, I gave those figures approximately, and I am trying to give you as near accurately as I can. I think these are approximate figures.

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Q. You mean you did not own $3,500,000? A. No, three million one—three million nine, today, and, there has not been any sold.

Q. That is the correct figure? A. That deposition should be corrected.

Q. You testified that you have no interest in the St. Joe Paper Company or in the duPont Estate? A. That is right.

Q. Do you owe any money to any of the Florida National Group of Banks? A. I do.

Q. To which bank? A. Florida National at Miami.

Q. And are any of these $3,100,000 of bonds pledged to that bank? A. Yes, $2,599,000.

Q. Are the other men whom you have mentioned, W. G. Welbon, Gail E. Chandler, John W. Snyder, O. A. Statler and A. W. Corbett—do any of them, so far as you know, have loans with any of the Florida National Group of Banks? A. Well, I would say that John W. Snyder certainly did not. I doubt if Mr. Welbon does, and as to the others, I would not be in a position to state positively.

Q. Didn't you state more or less positively on your deposition that some of the others did? A. I assume that they still have. I know that at one time they did. Whether they do or not, I don't know.

Q. Well, will you state what you do know as to which of them have had loans in the past with any one of the Florida National Group of Banks? A. Well, at one time or another all of them had that I recall, but I don't believe that some of them do at this time.

Q. And you say that you do not know that some of them have loans at this time? A. No.

Q. Which do you think do not have loans at this time? A. Well, I am reasonably sure that Doctor Snyder doesn't, and I am quite sure Mr. Welbon doesn't, although I wouldn't make that as a positive assertion, as I am not sure about Doctor Chandler.

Q. Did these Messrs. Welbon, Doctor Chandler, Doctor Snyder, Mr. Statler and Mr. Corbett, all become interested in the purchase of the Florida East Coast Railway bonds as a result of suggestions by your own interests that you had in the bonds? Is that a fair statement? A. I think so. And, a good many others that were not parties to this suit.

Q. In the past, has not your position been that you opposed any plan of reorganization which did not provide for independent operation and control of the Florida East Coast?

Mr. Walton: If your Honor please, I object to the question that, on the ground that what Mr. Claughton's position in the past has been, has nothing to do with the issue before the Court, namely whether the plan is or should not be approved.

The Court: It may have something to do with it. I wanted to ask him, myself, why he objected to the plan.

A. I would be very happy to tell you.

Mr. Bourne: I would rather have somebody else ask it.

What is your answer to the question?

A. Read it, please.

. . . The question was read.

A. I believe I am on record with the Interstate Commerce Commission that I reserve the right to look at any plan and make my own decision. That record will show that I opposed the original duPont plan for the reason that it was, at that time, similar to the Coast Line's present plan. And, I reserved the right to look. But, in the absence of any plan I would prefer the independent plan that was originally passed on by the Interstate Commerce Commission in 1945.

The Court: You mean that is the plan that Mr. Ball presented? A. Yes, sir. Because that gave us ownership of the property, and, on the assumption that we did own the property, and, if I was misled,—and I certainly think

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I have been—I purchased those bonds on the strength of the fact that they told me at that time that I did own that part of the railroad, and it would be my own ownership, and I acquired these bonds for the purpose of ownership. I am very greatly interested in the development——

Q. That plan that you speak of, if I have it in my mind right,—and if I haven't, correct me—provided the common stock should be voting stock and go prorated to the owners of the refunding bonds? A. That is right.

Q. That would give you some common stock? A. That is right. The fact of the matter is, we tried to advocate a debt-free reorganization and let all of it be common stock.

Q. Of course, you have to answer counsel's question as to what your position has been. I am not interested in it now. A. Yes, sir.

Mr. Bourne: Well, I will put that question, too.

The Court: Has he answered satisfactorily?

Mr. Bourne: I do not think I will pursue it further.

By Mr. Bourne:

Q. Is your present position that you oppose any plan for the unification of the Florida East Coast and the Atlantic Coast Line, or merely that you oppose this particular plan approved by the Commission? A. I oppose this particular plan. Beyond that, I would have to see any proposed changes in the plan before I could answer your question. I certainly would oppose the present plan because I have several serious objections to it. I do not feel I am getting fair value. I do not feel I should pay taxes in reorganizations for securities that I don't care to purchase, and if I wanted Coast Line, I could purchase a larger income than the Coast Line is offering me.

Q. Have you been advised that you will have to pay taxes on this plan? A. That is a subject that I have discussed with our lawyers and auditors, and they are of the

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opinion I might have to pay. Of course, that would depend on the Internal Revenue Department rulings.

Q. Have you been advised that you would not have to pay taxes under the plan provided in 1945? A. That was not discussed. That was not before us at that time, and we haven't taken this matter up.

Q. Well, assuming the necessity of having to pay taxes as a factor, isn't the rational thing to do, if you obtained a compromise, what you would have to do in another compromise? A. If I have to pay taxes on an internal reorganization, I would feel that I had an equity that was something to me that would substantially justify me in paying taxes.

Q. Isn't that a different point? A. What?

Q. Isn't that a different point? A. Well, I might be paying taxes, or be willing to pay taxes in an internal reorganization where I certainly would object to paying in a case of this kind.

Q. In your deposition on November 10th, 1948, wasn't one of your criticisms of the present plan, that that plan provides for a divisional first mortgage bond which is guaranteed as to principal only? A. Well, I certainly would object——

The Court: Guaranteed as to interest only?

Mr. Bourne: No, I am reading from the minutes of the deposition.

The Court: Oh.

By Mr. Bourne:

Q. (Exhibiting deposition to the witness). A. (Witness examining deposition).

Q. Did you not, at the time this deposition was taken, give as one of the reasons for your opposition to the Commission's plan, that the divisional first mortgage bonds would be guaranteed as to principal only? A. I might have. It shows there. I certainly would object to taking divisional bonds, and my understanding is it is guaranteed only as to interest.

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Q. Now, will you answer my question, please? Did you or did you not give that reason at the time the deposition was taken? A. One, among many.

Q. Would the fact that the divisional first mortgage bonds are a direct obligation, or, would be a direct obligation of the Atlantic Coast Line as to both principal and interest, in your judgment, materially affect your view of the plan? In other words, that you are mistaken in saying that they are guaranteed as to interest only? A. No, I don't think it would alter my situation, because at the present time there are twelve million dollars first mortgage bonds outstanding, of the Florida East Coast, and the plan provides that those bonds be paid off out of earnings that belong to the First and Refunding bondholders. A. Now, if you are going to pay twelve million dollars, or part of the twelve million dollars of that debt and issue me, in exchange, a security of the Coast Line, I certainly would object to it. Whether it was a divisional first mortgage, generally, or notes, or most any other kind of security, because I would be much better off if the Court so pleased, to permit the twelve million dollars, of the present mortgage on there, until it matures in 1959. I think that would be justifiable.

Q. At the hearings, in 1945, did not Mr. Walton, on your behalf, object to the original Atlantic Coast Line plan on the ground that it provided for preferred stock and common stock and that the net effect would be to give the Florida East Coast bondholders only approximately a six per cent interest in the equity of the Atlantic Coast Line? A. Are you speaking of an interest, or six per cent of the voting stock?

Q. It is the same thing. Interest in the equity. A. I do not think so, because my recollection of the 60,800 shares outstanding, represent an "X" per cent of the voting stock, and when the new plan came down from the Interstate Commerce Commission and they made the preferred stock voting and participating, presumably, I think, they altered that percentage.

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Q. I am sure it altered the percentage, Mr. Claughton, and my question is directed to this: Whether your major criticism that you made of the Coast Line plan was not—I will rephrase the question. Whether you did not make, as a major criticism of the Coast Line plan as originally proposed, the fact that it was a non-participating preferred stock, and the Florida East Coast bondholders as a group would only have a six per cent interest in the equity and whether it was not changed by the Commission, through its provision that it would be a participating preferred stock? A. That certainly would have been one of my objections. If it was not stated at that time, it should have been. I don't recall how he phrased it.

Q. Now, did the fact that the Commission made the change not influence you toward a plan of unification of the two roads? A. No, because it still limits me in the participation.

Q. What? A. It still limits me in the participation of any earnings of the Florida East Coast, by sharing it with some eight hundred thousand odd stockholders——

Q. And permits you to share in earnings of the Atlantic Coast Line, does it not? A. That is a difficult question.

Q. To what extent is it difficult? A. I had before me, down there, one of your statements showing some earnings. If I may get it, I would like to have it.

Q. You may. A. (After procuring paper) I don't know that this is in evidence, but I was reading it, and I wanted to know if your question now, before I answer it, is limited to operating income, railway income, or straight income, freight income.

Q. My question, I think, incorporated your answer, and your answer spoke about earnings. A. Well, if the other income here represents, in a major portion, income from the operation of the L & N and receiving dividends, then there would not be anything at all from the Coast Line; in fact, there would be a deficit, a net deficit for fixed charges, even, if I am reading this correctly, and I think I am.

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Q. What are you reading? A. (Tendering counsel paper.) If this $3,643,000——

Q. Let us identify the paper. You are referring to a document consisting of five sheets which were circulated by me, yesterday, with a statement that I expected to offer that in evidence at this hearing. A. I qualified my statement, then, that I did not know whether it had been.

Q. That is all right. I simply wanted to identify the paper. This one is entitled, "Earnings per share of stock under proposed unification of the Atlantic Coast Line Railway Company and the Florida East Coast Railway Company, considering similar earnings, assuming reorganization of the Florida East Coast Railway Company twelve months ended October 31, 1947." Is that right? A. That is right.

Q. Would you make your comments, please? A. Under the heading of "Railway Revenues and Railway Operating Expenses", you have a net railway operating income of $3,839,069. On the same page, income available for fixed charges shows $10,478,971. That includes other income of $6,795,764, which I presume is received from the L & N dividends and other investments.

Q. Do you know what the other major items are, major items of other income are, in fact? A. No, but calculating the eight hundred thousand odd of L & N stock that is owned by the Coast Line, and the dividends that are received, I would say that about fifty per cent was approximate.

Q. Well, in forming your opinion as to the fairness of this plan, Mr. Claughton, haven't you been interested to find out what the Atlantic Coast Line's other income was? A. Well, I didn't know.

Q. All right, what is it besides L & N stock? A. I have tried to search out more specific information and I have not had that presented to me, other than this information right here. I would like to have a break-down of that, sir.

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Q. Did you read the Commission's report? A. I think so.

Q. Well, what did you learn from the Commission's report about the interest that the Atlantic Coast Line has in other railroads besides the L & N? A. That the total operating group of railroads, about five, if you study them individually, I believe, are not earning and paying dividends. I am not sure——

Q. That is your present best recollection of all that you learned from the Commission's report on that subject? A. Well, if you will permit me to read up a little bit on some of the information that I have and have available here with me, I will be glad to give you that information in the morning, sir.

Q. No, I am attempting to ascertain the reasons why you are opposed to this plan, and I ask you this, Mr. Claughton: Don't you consider it important, in judging the value of the new securities which would be issued under the plan, whether or not the Atlantic Coast Line has independent interests in other railroads besides the L & N? Isn't that an important factor? A. Well, they have other interests in other railroads that I wouldn't consider as important as the L & N, and I have no assurance they are going to continue the L & N, and one of my objections as you remember I stated in my deposition, it was a very foolish move of stockholders of the Coast Line, who have a considerable amount of money out, to sell a dividend-paying stock that was paying him the proportion of seven dollars a share, or its equivalent, in the split-up and retiring a debt of four per cent.

Q. Let me ask you this, Mr. Claughton: As you said, the Atlantic Coast Line now has eight hundred and some odd thousand shares of L & N stock? A. That was my understanding.

Q. What is your present understanding as to what would happen under the Commission's plan, to the Florida East Coast bondholders if there should be a distribution

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of the L & N Stock? A. A distribtuion to the stockholders? Or, a sale of the stock?

Q. I don't know who else it could be distributed to, Mr. Claughton. A. Well, in the past, you——

Q. What? A. In the past, you sold it and retired debts. Now, you have a debt coming up in '52 and '54. I did not see an estimate in the Interstate Commerce Commission's report as to how they provided for the amortization or retirement or refunding of that. I certainly would not want to, as a bondholder of the Florida East Coast, take securities in a corporation that had that maturity that close with the changing money conditions.

Q. Will you try and answer my question? My question is, what is your present understanding as to the operation of the plan in the event that the L. & N. stock, owned by the Atlantic Coast Line Railroad, should be distributed to the stockholders? A. If it would have the effect of reducing the present maturity value by the amount of dollars received for the L & N stock,——

Q. Well, would the Florida East Coast bondholders get their share of that stock, or wouldn't they? What do you understand on that point? A. Well, I would certainly think so, if they were foolish to exchange the present Florida East Coast Railway bonds for stock in the Coast Line, and there was a distribution of any assets, I certainly think they would be entitled to them on a pro rata rating.

Q. Don't you think that is a valuable right? A. It would amount to a very small proportion. If you would tell me from the morning paper what L & N stock sold for, I can give you a rough calculation. If it is selling today at 35 a share, it would only amount to twenty-seven or twenty-eight dollars a share for a share of Coast Line stock. I am not trying to quote the price of the stock. I do not know.

Q. Would you say that again, please? A. If the L & N stock were selling for thirty-five dollars a share, using round figures, and it was divided proportionately between the nine hundred thousand odd stockholders, it would amount

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to approximately twenty-seven or twenty-eight dollars a share.

Q. For the Coast Line stock? A. That is right.

Q. How many shares of Coast Line stock does the FEC bondholer get? A. Well, I think you offered, here, in this arrangement here, one and one-third shares on each one hundred dollar bond. I mean, one thousand dollar bond.

Q. Well, didn't you, in your prior calculation of how much it would be per share of stock, include the perferred as well as the common? A. Yes, sir.

Q. You did? A. Yes, sir.

Q. Well, how many shares of preferred and common does a Florida East Coast bondholder get? A. Well, he gets two shares of preferred. But, would it be an obligation of the company to distribute that to the preferred stockholders for par, dollar for dollar, before distributing the common, and, if so, it would reduce my figures considerably.

Q. It would reduce your figures considerably? A. That is right. The amount each stockholder did receive. If the proceeds of the L & N stock had to be used to retire the outstanding preferred.

Q. It would increase the amount the Florida East Coast bondholder would receive, being holders of the preferred stock? A. They would receive, dollar for dollar, whatever the amount might be if it was retired.

Q. Have you ever figured it out, how much it would be? A. No.

The Court: Our reporter is looking at me rather beseechingly, and I think we had better rest a moment.

. . . A formal recess was had, and thereupon the following further proceedings were had:

The Court: Be seated, Gentlemen. Proceed.

By Mr. Bourne:

Q. Mr. Claughton, did you say that you thought that the Atlantic Coast Line Railroad might sell the L & N stock

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and use it to pay off their debts at maturity in 1951? A. I have no recollection or haven't made any search, or, in the past have I ever found where they made any distribution of any of the securities.

Q. Is this, if you know—Didn't you suggest that previously— A. That was a possibility.

Q. —that they sold some L & N stock in order to pay off some debts? A. I think that is right.

Q. And you called attention to the fact— A. That they might do so in the future.

Q. —that they might do so in the future. Is it your position that that would be damaging to the Florida East Coast bondholder as the holder of the Atlantic Coast Line stock? A. Yes, because without the dividends from that and other securities that might be sold likewise, the operating income from the Coast Line is not sufficient to meet its fixed charges.

Q. Well, are you, in that case, assuming that the fixed charges would not be reduced as a result of retiring a debt that would be paid by the proceeds of the stock? A. I am assuming that they would, but, whether the amount would be sufficient to affect the dividends, and the rate of dividends they are receiving, which is much greater than the amount of income, that they would be saving, or, the expense that they would be saving.

Q. Have you made any calculation on that? A. I did on the last case, as I told you, and pointed out, I think, it amounted to several hundred thousands of dollars, as near as I can say, and as near as I can recollect now, it is about an eight hundred thousand dollar loss, or about a dollar a share to the present stockholders.

Q. In the case of the Florida East Coast Railway, you favor a debt-free reorganization? A. That is true.

Q. In the case of the Atlantic Coast Line you would think it bad judgment to sell securities to retire a debt, is that right? A. Well, if the income that they are receiving from those securities is so much greater than the ex-

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pense of carrying them, I would think so, yes. Now, I see no reason if I own something, why I should put a mortgage back on it to myself, and that is the case of the Florida East Coast Railway. If I owned the railroad, and the Interstate Commerce Commission told me that I did, why would I want to give myself back a mortgage for one-half or one-third or any portion of it, unless I was trying purposely to evade the payment of income

Q. Would you consider that an evasion of income taxes— A. Not necessarily——

Q. May I finish the question, please. Evasion of income taxes by having bonds issued against the property for income tax purposes? A. No, but I would, in that you balance it against the future when difficulties might arise and might prevent me from being able to carry my obligations, or pay my obligations. I believe I would rather run the risk of paying taxes than jeopardize the principal.

Q. In other words, you do not take the Commission's plan of January 8, 1945, which provided for a bonded debt of twenty million two hundred and fifty thousand dollars, to be sound in that respect? A. We accepted it, but had made out statement in 1943 and 1944. I believe the record shows we favored a debt-free reorganization, but in the absence of a debt-free, we had to accept that which was offered to us or presumably that was the case. When they told us who owned it, what difference did it make? A. In addition to this paper which you produced, one of our exhibits, which covers the twelve months' period ending October 31st, 1947, there was another one covering the twelve months ending October 31st, 1948. A. There may be. It seems to me like I saw one.

Q. Did you take the trouble to examine it? A. I did not have it. I do not believe I have a copy. I believe there is one.

Q. Did you take the trouble to examine it? A. I haven't got that. I have one, but this is the only one you gave me.

Q. Did I only give you one? A. That is my recollection.

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Q. Did you go over the proposal with Mr. Claughton? A. I beg your pardon?

Q. Did you go over the proposal with Mr. Walton? A. No.

Q. What are the papers you have in your pocket there? A. That happens to be a plan and notation. A copy of this plan here.

Q. Let me see it. A. (Tendering paper.)

Q. You have all of the exhibits—these exhibits are those which I circulated, excepting the one covering the twelve months' period ending October 31, 1948. A. If you say so. Let me see it. Will you let me have one, and I will make a comparison.

Q. I will be glad to let you have one. A. (Examining papers.)

Mr. Walton: May I have one, too?

Mr. Bourne: Didn't you have one before, Mr. Walton?

Mr. Walton: No, I do not have one either.

By Mr. Bourne:

Q. Do you know whether or not the Commission in its report of March 25, 1948, made some statements referring to a tabulation, identical, except for immaterial changes in words in this five sheet tabulation, relative to the twelve months ending October 31, 1947? A. Will you repeat that, please, because I was trying to read this and make this comparison, and I did not see any particular difference in the net.

. . . The question was read.

A. I haven't checked these against their statements, sir.

Q. Well, in the report of March 25, 1948, the Commission made a reference, did it not, to a summary of argument which I distributed, to which there was appended an appendix containing what the Commission called a test, based upon these reported results of the Coast Line at the end of that twelve months, October 31, 1947? A. I believe that

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I read that, since you call my attention to it, but I thought it was an attempt on their part to justify the position that they had taken, which otherwise I did not see how they could conscientiously do so.

Q. Did you think that it was an unfair attempt on their part to justify the position they are taking? A. I would use the words "a deliberate attempt to justify".

Q. In your deposition you said, didn't you, page 56, "and I have stated previously in this record that in several instances the Interstate Commerce Commission had to stretch its imagination to approve a plan that they could offer the bondholders, but actually the several statements to justify this is intended, no doubt, to mislead the small bondholders by confusing them by indicating that they would get more under this plan than the previously approved Interstate Commerce Commission plan."

Did you say that? A. I did, and I repeat it now.

Q. Mr. Claughton, you were at the hearings in West Palm Beach in November, 1945, weren't you? A. I was.

Q. And, at one juncture, you made a very vigorous protest against a ruling by the presiding Examiner, Mr. Boyden, did you not? A. That is true.

Q. And I, at that time, objected to any statement by you unless you took the stand, did I not? A. I think you made that statement.

Q. And you said that you would take the stand, did you not? A. I think so.

Q. And you did not take the stand, did you? A. I did not.

Q. And Mr. Walton came very shortly afterwards and then there were discussions as to when you were to take the stand and you decided not to take the stand, didn't you? A. Only on his advice, yes. And, I didn't see any particular reason, because the Examiners at that hearing reported adversely to the Coast Line's proposition and in favor of the bondholders, and reiterated their position, previous position of January 8, 1945, as I recall it, that the railway did belong to the bondholders.

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Q. Now, when you decided not to take the stand, Mr. Claughton, did you know what the Examiner was going to report? A. No, but from the preponderance of the evidence and statements of people who objected to the Coast Line intervening in this situation, or attempting to intervene and obtain possession, I thought I could see the way where the plan would be approved.

Q. And that is the only reason why you decided not to take the stand? A. That, among others.

Q. What are the others? A. One of them is personal.

Q. What is that? A. I said, it is personal.

Q. Are you willing to state it? A. I am not.

Mr. Walton: Your Honor, please, I think it is immaterial, why he decided not to take the stand.

The Court: Yes, I think so unless some impeachment is not involved. We are wasting a lot of time, to tell the truth. I am not going to undertake to decide all these things ancient history in the past, and water over the dam.

By Mr. Bourne:

Q. Mr. Claughton, have you been buying and selling Florida East Coast Railway bonds over a long period of time? A. I have.

Q. And have you had a great many purchases and sales? A. I think so.

Q. And what is the maximum amount which you owned at any one time? A. That would be difficult for me to say, without making some references.

The Court: Well, would it matter? Why go into all of the things in this man's life?

Mr. Bourne: Well, I will stop there. I would like to ask about two more questions.

By Mr. Bourne:

Q. You have been in joint real estate ventures with Mr. Ball, have you not? A. That is true.

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Q. And did Mr. Ball, or the Florida National Group of Banks, or any one of them, assist you in financing the enterprise which you have been interested in? A. Only in the one instance, in 1941, for a period of three months, in a construction loan and insurance loan—while a building was being completed and the insurance loan was placed on it.

Mr. Bourne: That is all I have.

The Court: Are there any questions by anybody else?

Mr. Walton: If your Honor please, I have some questions I would like to ask on redirect.

The Court: Proceed.

Re-direct examination by Mr. Walton:

Q. Mr. Claughton, you were asked about your testimony that the divisional first mortgage proposed by the Coast Line would be guaranteed as to principal only. Did you have reference as to the provision in the so-called plan that the new Atlantic Coast Line divisional first mortgage and income mortgage would be secured as to principal only by the properties of the debtor? A. That was my understanding.

Q. When you used the word "guaranteed", you meant "secured"? A. Well, I never expected the Coast Line to guarantee either the principal or the interest, but it would be a first mortgage only on the property which I now consider that we own.

Mr. Bourne: What are you reading from, Mr. Walton?

Mr. Walton: Page 620 of the printed copy of the summary of the first supplemental report.

Mr. Bourne: The summary?

Mr. Walton: Yes, sir.

By Mr. Walton:

Q. And was the point which you were undertaking to state the fact that the interest on that proposed divisional

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first mortgage would not be secured by the properties? A. That is my understanding, and, further, might be considered subordinate to the first generals of the Coast Line System. I am not sure as to how that indenture reads, or how it would read. But, it might be, and I certainly could not undertake or be expected to accept such securities.

Q. You have been asked a lot of questions about the distribution of L & N stock. That is, to Coast Line stockholders. Do you know of any proposal for any such distribution? A. No. As far as I have been able to ascertain, there never has been any distribution. Some have been disposed of and the assets or the proceeds were used to retire a collateral mortgage on the system.

Q. Has there been anything testified to or proposed in any of these proceedings, indicating that such a distribution is contemplated? A. No, sir, Mr. Walton. As I understood, the L & N stock had been pledged as collateral behind a bond, or series of bonds, and the influence of Coast Line, on L & N, and in some respects on the Coast Line Company, or the parent company, the Safe Deposit Committee influenced the officials or the directors to split the stock, reducing it from one hundred dollars to a fifty dollar par, and issuing two for one. In doing so, they increased the number of shares that the Coast Line had in the collateral agreement that enabled them to dispose of about a half of that, which they received and to retire the outstanding mortgages which had been issued as securities, which this was a balance due, and enabled them to then remove from the Trustees this eight hundred odd thousand shares of L & N stock and make it somewhat as free stock or treasury stock, presumably for some purpose that we do not understand or can not forsee. But, it is a temptation not to dispose of it or use it at some future time. I do not think that the management, as they have in the past, and in handling that particular transaction, would be what I would consider a trustee for me in handling my affairs, and that is what it would amount to if I become a partner to

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this Coast Line plan by changing my bonds for theirs. I do not think that their trusteeship for the stockholders has been, you might say, cogent.

Q. Mr. Bourne asked you quite a few questions about the tax consequences of the different types of reorganization. Is it not your understanding that there has been a ruling by the Department of Internal Revenue that an internal reorganization, such as was proposed in the second supplemental report, would be a tax-free reorganization? A. That has been done, or, that has been true in some of the past reorganizations. The Denver and Rio Grande, I believe, is one, and one or two others, and I am not sure whether the Bureau has made a statement to that effect, but I think they take a look at each interest or each instance on each situation separately, and I understand, however, that an internal reorganization, where eighty per cent of the bondholders or stockholders remained the same, that they are tax exempt and that would not be the case with the Coast Line. And, it would further de-value the amount of securities and would cause the bondholders of the F. E. C. to have to pay taxes on a stated value of securities that the Interstate Commerce Commission estimates, roughly, at thirty-six million, which has been estimated to have a market value of twenty-seven or twenty-eight million. It would cause them to have to pay a capital gains tax on something that they did not receive.

Now, more pointedly, these shares of stock, of Coast Line stock that would be issue have a statement or a stated value of one hundred dollars and a market value of forty-five dollars. You would be immediately taxed that difference over and above your pro rata cost of the bond, or, it might cost you as much as twenty-five dollars in this instance for that which sold for forty-five dollars. I am trying to make it clear to you, but I do not know whether—without actually knowing what the cost of the F. E. C. is. But, it could conceivably cost, in my instance—I would have to go out and raise one hundred and seventy-five to two

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hundred thousand dollars, perhaps, to pay taxes to be able to get the securities that they offered me over and above the ninety-one dollar pro rata, which is two hundred and seventy thousand dollars in round figures, and it would cost me somewhere in the neighborhood of maybe four hundred and fifty to five hundred thousand dollars in actual cash that I would either have to sell securities, or liquidate to pay the Government, or make some arrangement on.

Q. Mr. Claughton, Mr. Bourne also asked you about your bank loans and about some real estate transactions which you had been jointly interested in with Mr. Ball. Has there ever been anything in connection with any of those matters which has influenced your decision in connection with the so-called plan of reorganization used in the third supplemental report? A. No, sir. In the deposition Mr. Bourne asked me that particular question. That is, if I had in my pledge of the securities to the bank, likewise signed a power of attorney, and I have not and would not. Under any circumstances. And there has never been anything that would cause me, by any transactions between me and them, to take a position.

Q. When you say you would not sign a power of attorney, you do not mean that the pledge had been required? A. No, sir, never had been.

Q. What you mean to say is, if you had been requested, you would not have done so? A. That is right, and I so stated in my deposition. I do not believe my deposition has been offered as evidence. He referred to it several times there. But, that is a part of my statement there.

Q. At the outset of your cross-examination, the Court stated that he would be interested in knowing your reasons for opposing the so-called plan of reorganization used in the third supplemental report. I wish you would state those reasons very briefly and very concisely? A. Principally, the amount of securities that I am being given is not what I would consider a fair pro rata valuation of that which I own.

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Number 2, the type of security would certainly be objectionable.

Number 3, the company in which the securities are being given would be a serious objection to me.

Number 4, the question of whether I would have to pay out a large amount of money for taxes there.

Number 5, I would say that I am willing to take my chances on the earnings of an individually owned and operated railroad, owned by the bondholders, and I see no reason why I, as an individual, and a minority bondholder, should be caught between two groups, here, and be penalized to the extent that the Interstate Commerce Commission is trying to do.

Mr. Walton: You may come down.

The Court: Is that all for you, Mr. Walton?

Mr. Walton: Yes, your Honor, it is.

The Court: Is there someone else now?

Mr. MacFarlane: May it please your Honor, I would like to have Mr. Conn testify to the amount of his bonds, the circumstances and acquisitions. He was here yesterday morning, but on account of a family matter, had to return to Tampa. I expected him to be here today. He is not here. His examination on direct will not exceed five to ten minutes.

The Court: We will hear him when he comes back. Will he come back?

Mr. MacFarlane: He will be here tomorrow.

The Court: Is there any other evidence to be offered by any objectors?

. . . To which inquiry there was no response.

The Court: Now, could you use this time for the Coast Line?

Mr. Crossman: I could use the time on behalf of the Deposit Committee.

The Court: All right.

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William J. Stott, for Deposit Committee—Direct.

MR. WILLIAM J. STOTT, having been produced and first duly sworn as a witness on behalf of the Deposit Committee, First and Refunding Bonds, testified as follows:

Direct examination by Mr. Crossman:

Q. Will you state your name and address? A. My name is William J. Stott. I live at 1025 Post Road, Scarsdale, New York.

Q. Will you describe your present employment? A. I am at present assistant secretary of J. P. Morgan Company, Incorporated.

Q. How long have you worked for J. P. Morgan & Company, Incorporated? A. Since I got out of college in 1935.

Q. Where did you attend college? A. Tufts College, Bedford, Massachusetts.

Q. What did you receive there? What degree? A. B.S., in Engineering.

Q. What has been your chief experience in the fifteen years you have been with J. P. Morgan? A. The first seven years with J. P. Morgan & Company, I was assistant statistician in the railroad division statistical department. For the last six years I have been a senior railroad statistician for the firm.

Q. Describe generally what your duties have been in that capacity? A. As railroad statistician for J. P. Morgan & Company, it has been my duty to prepare reports analyzing the traffic and revenue trends, operating results, financial position and capital structures and securities of railroads. These reports are used by the loan, investment and trust departments of the bank in appraising the credit standing and relative security valuations of railroads.

Q. Have they been acted upon by those committees in decisions as to whether to buy or sell? A. They certainly have been the basis of the decisions. They haven't been always followed.

Q. What is the position with the Deposit Committee for the five per cent bonds? A. I am acting secretary of the Committee.

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